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No. A-474

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1995 TERM

EDWARD BARKAUSKAS, Petitioner
vs.
PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

QUESTION PRESENTED FOR REVIEW

Does the dismissal of a Post Conviction motion without benefit of an evidentiary hearing constitute a violation of the defendant's due process right to a fair trial, when the dismissal is based on the doctrine of Res Judicata due to the Petitioner's prior limited Habeas Corpus hearing?

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Certiorari should be granted because the dismissal of a Post Conviction motion without benefit of an evidentiary hearing on grounds that the motion is precluded by the doctrine of Res Judicata due to the Petitioner's prior limited Habeas Corpus hearing constitutes a violation of the defendant's constitutional due process right to a fair trial

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IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD BARKAUSKAS, Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner Edward Barkauskas respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois entered on June 17, 1994, affirming petitioner's conviction for murder.

OPINIONS BELOW

The Petitioner's previous state and federal proceedings prior to the current case are attached as Appendix A through F.

The opinion of the Appellate Court of Illinois, First District, in People v. Edward Barkauskas is attached to this petition as Appendix H. Petitioner unsuccessfully sought leave to appeal to the Illinois Supreme Court, and a copy of the order denying Leave to Appeal are attached as Appendix I.

JURISDICTION

The final judgment of the Appellate Court of Illinois in People v. Edward Barkauskas, was entered in an opinion filed on June 17, 1994. Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on October 6, 1994.

The jurisdiction of this Court to review the judgment of the Appellate Court of Illinois is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Edward Barkauskas was arrested on July 16, 1981, in conjunction with the homicide of his wife, Joanne Barkauskas. On August 3, 1981, he was indicted for murder, armed violence, solicitation, and conspiracy. Also arrested and charged with murder in connection with the incident were Joseph Beringer, Kenneth Beringer, and James Galason. Following their indictments, Mr. Galason agreed to testify against Edward Barkauskas, Ken Beringer, and Joe Beringer in exchange for receiving a twenty year sentence. Edward Barkauskas and the Beringer brothers received separate trials. At Mr. Barkauskas' trial, Mr. Galason was the state's main witness and testified that Joseph Beringer had committed the actual shooting of Joanne Barkauskas, while he, Mr. Galason, drove the getaway car. In February, 1983, a jury convicted Edward Barkauskas of murdering his wife by hiring James Galason, Kenneth Beringer, and Joseph Beringer to kill her in order to obtain life insurance proceeds. This conviction was based almost entirely on Mr. Galason's testimony. Mr. Barkauskas was sentenced to natural life in prison.

Mr. Barkauskas exhausted state remedies, and then filed a habeas corpus petition in the United States District Court, alleging that the prosecutor withheld material information favorable to his defense in violation of the Brady Rule. Brady v. Maryland, 373 U.S. 83, 10 83 S. Ct. 1194 (1963). Specifically, Mr. Barkauskas stated that the prosecution was aware that an eye witness, Harvey Webb, (who did not testify at Mr. Barkauskas' trial) had identified Mr. Galason as the "shooter" at a line-up shortly after the murder,

and failed to disclose this to the defense, in violation of the Brady rule. Barkauskas' habeas corpus petition was denied by the District Court, and he appealed to the Seventh Circuit Court of Appeals.

The Seventh Circuit, in remanding the case, noted that at the hearing for a new trial before the trial judge, "the prosecutor merely stated that until February 21, Webb had identified only Joseph Beringer as the triggerman." Barkauskas v. Lane, 878 R. 2d 1031, 1033 (7th Cir. 1989). The court went on to say that it was "improbable that the prosecutor would not have been informed about the line-up." Id. This court concluded that the question of whether the prosecutor had been so informed was not explored at the only evidentiary hearing held on Mr. Barkauskas' motion for a new trial. Accordingly, the Seventh Circuit reversed and remanded the case for the purpose of conducting an evidentiary hearing to determine "whether the prosecutor knew before Barkauskas' trial that Webb had identified Galason at the line-up as the triggerman." Barkauskas v. Lane, supra. 878 R. 2d at 1033.

Upon remand, this case was assigned to Magistrate Elaine Bucklo, for the purpose of conducting an evidentiary hearing. On January 11, 1990, an evidentiary hearing was held, at which time defense counsel failed to offer any evidence or testimony in support of his petition for habeas corpus relief.

Following the hearing, Mr. Barkauskas, through substitute counsel, moved to reopen the hearing. Magistrate Bucklo, although granting the motion to reopen the evidentiary hearing, limited the hearing to the testimony of Mr. Harvey Webb. Subsequent to the

evidentiary hearing, the District Court ruled that the petitioner had not met his burden of proof on the question of whether the prosecution at the original trial concealed favorable material information from the defense. As such, the District Court again denied Mr. Barkauskas' petition for habeas corpus relief.

The Petitioner then unsuccessfully appealed the District Court's decision. Following this the Petitioner filed a Post-Conviction motion in the Illinois state court which was dismissed as Res Judicata. Following unsuccessful appeals to the Illinois Appellate and Supreme Courts Petitioner filed the instant Petition.

REASONS FOR GRANTING THE WRIT

This court has found that the failure to disclose favorable evidence which would tend to negate the defendant's guilt violates the defendant's constitutional right to a fair trial. Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194 (1963). The current case has a storied history surrounding the State's failure to provide the petitioner with evidence, provided to the State by an eyewitness, that tended to negate the defendant's guilt. The principle that requires the prosecution to disclose exculpatory materials upon request, see Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), extends to materials that would tend to exculpate the defendant by undermining the credibility of a government witness. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed. 2d 481 (1985); United States v. Douglas, 874 F. 2d 1145, 1163 (7th Cir. 1989); United States v. Herrera-Medina, 853 F. 2d 564, 567 (7th Cir. 1988).

At the petitioner's motion for new trial, the petitioner presented the trial court with the testimony of eyewitness Harvey Webb from the trial of Joseph and Kenneth Beringer. Mr. Webb testified at that trial that James Galason (the State's star witness), not Joseph Beringer, shot Mrs. Barkauskas. Moreover, Mr. Webb testified that at the police line-up of July 16, 1981, he identified James Galason as the occupant of the red Camaro who shot the victim. Sometime in 1983, in a meeting with Assistant States Attorney Kenneth Wadas and "another guy," he identified James Galason as the gunman. (R. 1790-1808) This other guy may have been an Assistant State's Attorney.

Defense counsel argued at petitioner's motion for new trial that the above mentioned material violated the defendant's constitutional rights as interpreted by this court under Brady. The trial court ruled that the defendant was not entitled to a new trial as the defendant did not prove that the exculpatory material was known to the State prior to the defendant's trial.

Later, at the defendant's habeas evidentiary hearing the magistrate chose to believe the testimony of ASA Wadas rather than Mr. Webb. Although the magistrate listed a number of reasons why it found Mr. Webb incredible, it was not put into the context of the fact that Mr. Wadas *clearly* lied and misled the trial court and the defendant in hiding his discussions with the witness. (Trial Transcript A.38-42), (page 9&10 transcripts from Wadas A.R.D.C. hearing), (Habeas hearing transcript at 38-54).

Hence, the trial court at the motion for new trial (the trial judge who heard all testimony and was in the best position to assess the impact of the evidence on the trial) found that he would grant a new trial if the defendant could prove the State knew of the evidence prior to trial. The district court ruled that the defendant did prove the state may have known of the Brady material prior to the trial but did not find the defendant credible. The magistrate based this decision primarily on the defendant's faulty memory of events which occurred over seven years prior to his testimony (Magistrate Bucklo's Report and Recommendation after Evidentiary Hearing. Dated May 25, 1990, pp. 5-7).

Clearly the defendant has been caught between the proverbial rock and hard place. At the state level

the trial judge found the defendant's motion for new trial lacking for failing to establish the State's knowledge. At the federal level the magistrate found the defendant's habeas lacking as the defendant's witness was not credible due to the memory gaps of the defendant's witness due to the passage of time.

Lost in the maze of exceptions to the defendant's due process rights is the fact that the defendant is serving a natural life sentence due to the State's mendacity.

At issue before this court is whether the defendant should be allowed an evidentiary hearing before a state judge pursuant to the defendant's post conviction motion (Ill. Rev. Stat. 1991, Ch. 38, Par. 122-1). The trial judge ruled (and the appellate court agreed) that the defendant's post conviction motion was precluded by the doctrine of Res Judicata.

The trial court and appellate court both correctly noted that the defendant received an evidentiary hearing on his habeas motion. Generally, such a hearing would preclude the defendant's post-conviction motion under the doctrine of Res Judicata as noted by the courts below.

This court has recognized that the doctrine of Res Judicata would bar the defendant from raising claims raised under a habeas proceeding in collateral proceedings in Illinois courts under the Post-Conviction Hearing Act Teague v. Lane (1989), 48 9 U.S. 288, 297, 109 S. Ct. 1060, 1068, 103 L.Ed. 2d 334, 347. Nevertheless, this court has also recognized that *fundamental fairness* may require that the doctrine of Res Judicata be overlooked. Id. 489 U.S. at 297. Such is the case here.

Outside of the fact that the defendant has had

to fight an uphill battle against a governmental body bent on deceit, he has also been strapped with the problems of a witness trying to recall events which happened seven years prior. Two other issues illustrate that fundamental fairness requires that the doctrine of Res Judicata be overlooked.

First, the defendant's evidentiary hearing at the district court level on which the Res Judicata was based was limited to two witnesses over the defendant's objections. Hence, the defendant could not present evidence to corroborate Mr. Webb's testimony or impeach Mr. Wadas'. Therefore, although the defendant did have an evidentiary hearing regarding the Brady violation, its limitation to two witnesses by the magistrate was such that fundamental fairness requires a full evidentiary hearing. This is especially true given the fact that the doctrine of Res Judicata itself is based on the prior full litigation of defendant's claims, such that a new hearing would be merely cumulative. Since a full hearing was not had in this case a full hearing would allow the defendant to present all of his evidence which would include evidence not just cumulative in nature.

The Supreme Court in Teague v. Lane (1989), 48 9 U.S. 288, 297, 109 S. Ct. 1060, 1068, 103 L.Ed. 2d 334, 347. stated: "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations, the right to confront and cross-examine witnesses, and to bring all witnesses in one's own behalf, have long been recognized as essential to due process. Id. at 294. The Court went on to state: "Few rights are more fundamental than that of an accused to present

witnesses in his own defense." Id. at 302. In looking at the case at bar we must measure it next to the standard as outlined by the Supreme Court in United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440 (1982):

> Due process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Valenzuela-Bernal at 872.

In the instant cause it is readily apparent that the court's decision to dismiss the Petitioner's Post Conviction Motion precluded Edward Barkauskas from receiving a full evidentiary hearing which would allow the presentation of all of his witnesses. This was fundamentally unfair.

Additionally, the necessity of the evidentiary hearing as was expressed originally by the 7th Circuit, was due to the fact that the issue regarding the alleged Brady violation needed to be explored. What better way to fully explore the issue than by allowing both sides to present *all* available evidence and testimony. "Truth is more likely to be arrived at by hearing testimony of all persons of competent understanding

who may seem to have knowledge of facts involved in the case, leaving credit and weight of such testimony to be determined by jury or court." Washington v. Texas, 388 U.S. 14, 21, 87 S.Ct. 1920 (1967).

The ruling on the Petitioner's post conviction motion, clearly hindered the truth-seeking process and additionally deprived Mr. Barkauskas the opportunity to a full and fair hearing. This being the case, it is glaringly apparent that Mr. Barkauskas has been deprived of his right of due process of law pursuant to the Sixth Amendment of the Constitution.

Second, the defendant did not present two arguments to the district court which are not Res Judicata and which require an evidentiary hearing. The State had a duty to disclose Webb's identification of Galason even if the prosecutor didn't know about it until after the Barkauskas trial. Also, the knowledge possessed by whichever prosecutor was present at the line-up should be imputed to Barkauskas' prosecutor.

Without an evidentiary hearing it is unclear whether other members of the office of the States' Attorney knew or now know of any evidence of Mr. Webb's statements as to the identity of the gunman. However, there was mention of "another guy" who was present during Mr. Webb's interview who may be connected to the State's Attorney's Office. Obviously evidence that could be considered Brady material known to other members of the Assistant States Attorney's Office would both be relevant in establishing the defendant's case as well as bolstering the credibility of Mr. Webb. Pursuant to this court's ruling in Giglio v. United States the knowledge of Brady evidence of any member of the States Attorney's Office would be imputed to ASA Wadas. "The

prosecutor's office is an entity and as such it is the spokesman for the government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Giglio v. U.S. (405 U.S. 150, 92 S.Ct. 763, 766, 31 L.Ed. 104 [1972]). See also, United States, ex rel. Smith v. Fairman, 769 F. 2d 386, 391-392 (7th Cir. 1985).

Finally, the defendant was hamstrung in his attempt to present his case at the habeas evidentiary hearing by the untimely withdrawal of the defendant's habeas counsel and the defendant's hiring at the last minute of incompetent counsel who failed to zealously argue defendant's claim.

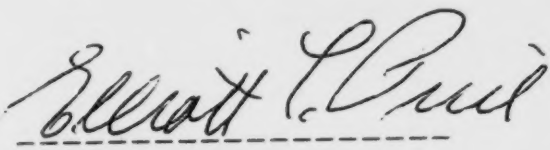
The instant decision represents an erosion of the constitutional requirement that a criminal defendant be afforded due process and the right to a fair trial. The defendant was originally denied a fair trial and is now unable to prove this fact at an evidentiary hearing. While some evidence and issues may be cumulative, fundamental fairness requires that the defendant be allowed to present all evidence, witnesses and issues to the state court before serving a natural life sentence.

For these reasons, the Petitioner respectfully requests that certiorari be allowed.

CONCLUSION

For the foregoing reasons, Petitioner Edward Barkauskas respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,



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APPENDIX

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APPENDIX A

People v. Barkauskas, 147 Ill.App.3d 360,
497 N.E.2d 1183 (1st Dist. 1986)

147 Ill.App.3d 360
100 Ill.Dec. 821

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	No. 83-0883
v.	)	Appellate Court of Illinois, First District, First Division.
EDWARD BARKAUSKAS,	)	
Defendant-Appellant	)	Aug. 25, 1986.

Defendant was convicted in the Circuit Court, Cook County, Romie J. Palmer, J., of the murder of his wife and sentenced to natural life in prison, and he appealed. The Appellate Court, Buckley, J., held that: (1) no *Brady* violation was demonstrated with respect to the failure to disclose testimony from the codefendants' trial identifying the witness against the defendant as the one who shot the defendant's wife; (2) the evidence supported the conviction; (3) the defendant was not denied a fair trial based on comments made by the prosecutor during rebuttal argument and examination of two witnesses; and (4) the trial court did not abuse its discretion in imposing the sentence.

Affirmed

1. Criminal Law 700(6)

Evidence supported trial court's determination that prosecution did not possess any information with respect to identification of witness as shooter of defendant's wife prior to or during defendant's trial and, therefore, there was no *Brady*

violation in failure to disclose identifications which were made in subsequent trial of codefendants and which were sought to impeach witness.

2. Criminal Law 700(3)

Identification of witness as shooter of defendant's wife was not material to defendant's guilt or innocence and, therefore, no *Brady* violation was demonstrated by failure to disclose identification, even though information may have been relevant to guilt or punishment of witness, as evidence did not rebut either his testimony or the independently corroborated evidence that defendant conspired to murder his wife.

3. Homicide 250

Evidence was sufficient to establish that defendant was accountable for his wife's death, even though defendant claimed that he was not proven guilty beyond reasonable doubt because state's case was based solely on uncorroborated testimony of "pathological liar" who allegedly traded his story for light prison sentence. S.H.A. ch. 38, ¶ 5-2(c).

4. Criminal Law 726

Prosecutor's closing argument containing comments that he was precluded from questioning victim's father about victim's marriage and that he was unable to contact victim's divorce attorney were invited by defense counsel's closing argument that defendant had good marital relationship and that prosecution failed to produce on witness to corroborate testimony that defendant told witness that defendant's wife wanted divorce and, as such, were proper in prosecution for murder of defendant's wife. S.H.A. ch. 38, ¶ 9-1(a).

5. Criminal Law 730(7)

Any alleged harm arising out of prosecutor's closing argument concerning defendant's marriage was alleviated by trial court's decision to sustain objections and instruct jury to disregard arguments not based on evidence in murder prosecution.

6. Criminal Law 724(1)

No prejudice resulted from prosecutor's reference to defense counsel as "director" of allegedly manufactured testimony; rather, argument was proper comment on evidence and credibility of defendant as opposed to accusation that defense counsel fabricated defense and encouraged defendant to testify accordingly.

7. Witnesses 414(2)

Prior consistent statements of witness were admissible to refute assertions of fabrication.

8. Criminal Law 1170 ½(6)

Cautionary instruction given to jury was sufficient to cure any prejudice arising out of cross-examination of witness as to whether she knew that when another witness was arrested, he told police who had hired him to kill defendant's wife.

9. Criminal Law 1171.8(1, 2)

Even if remarks by prosecutor in redirect examination of witness and cross-examination of another witness were error, they were not so prejudicial as to have been material factor in defendant's murder conviction or to have denied him fair trial where there was overwhelming evidence of the defendant's guilt of murdering his wife.

10. Criminal Law 627.8(4,5)

Procedure followed by trial court in conducting in-camera inspection of witness' mental health records outside presence of prosecutor and defense counsel and in releasing relevant portion of material contained in three-page discharge summary adequately protected defendant's right to fair trial and at same time observed hospital's and witness' right to confidentiality in nonmaterial information contained in records defendant sought to subpoena. U.S.C.A. Const.Amends. 6, 14; S.H.A. Const. Art. 1 §§ 2, 8; S.H.A. ch. 110A, ¶ 412(h).

11. Criminal Law 641.13(2)

Defendant failed to establish that his counsel's allegedly inadequate representation affected outcome of his trial by virtue of defense counsel's failure to tender transcripts of additional proceedings in codefendant's trial where additional information would not have altered trial court's decision to deny defendant's motion for new trial based on alleged *Brady* violation. U.S. C.A. Const.Amend. 6.

12. Criminal Law 814(18)

No evidence was produced at trial to support nonpattern instruction that witness was narcotics addict and that his testimony was subject to suspicion due to allegation that habitual users of narcotics become notorious liars. IPI Criminal 2d 1.02.

13. Criminal Law 776(3,5)

Trial court did not abuse its discretion in not giving nonpattern instruction that defendant had reputation as "faithful and loving husband" and that evidence could be sufficient when considered with other evidence to raise reasonable doubt as to defendant's guilt of murdering his wife where witnesses offered

their personal opinions based on their own observations of defendant's marital happiness, but did not testify to his reputation as being "faithful and loving husband." IPI Criminal 2d 3.16.

14. Criminal Law 1173.2

Defendant failed to establish prejudice resulting from trial court's refusal to tender defendant's nonpattern jury instructions in prosecution for murder of defendant's wife.

15. Homicide 354

Trial court did not abuse its discretion in sentencing defendant to natural life in prison for murder of defendant's wife where defendant in cold and calculating way did "spearhead" tragic events leading to his wife's murder and confessions of codefendants introduced in aggravation supported depth of culpability of defendant. S.H.A. ch. 38, ¶ 9-1(a).

Steven Clark, Deputy Defender, Richard F. Faust, Asst. Appellant Defender, Chicago, for defendant-appellant.

Richard M. Daley, Cook County State's Atty., Chicago (Michael E. Shabat, Patrick J. Foley, Asst. State's Attys., of counsel), for plaintiff-appellee.

Justice BUCKLEY delivered the opinion of the court:

Following a jury trial, defendant Edward Barkauskas was convicted of the murder of his wife (Ill.Rev.Stat.1979, as amended, ch. 38, par. 9-1(a) and armed violence (Ill.Rev.Stat.1979, as amended, ch.38, par. 33A-2) solicitation (Ill.Rev.Stat.1979, as amended, ch. 38, par.8-1(a)), and conspiracy (Ill.Rev. Stat.1979, as amended, ch. 38, par. 8-2(a)) in connection with that murder. The judgments on armed

violence, solicitation, and conspiracy were vacated, and the trial court sentenced defendant to natural life in prison for murder. Defendant appeals, contending that: (1) the prosecution failed to comply with rules of discovery; (2) the prosecution failed to prove him guilty beyond a reasonable doubt; (3) prosecutorial misconduct deprived him of a fair trial; (4) the trial court erred in conducting an *in camera* inspection of a witness' mental health records outside the presence of counsel; (5) he received inadequate legal representation at trial; (6) the trial court erred in refusing to tender certain instructions to the jury; and (7) his natural life sentence is excessive. For the following reasons, we affirm.

The record reflects that a few weeks prior to the homicide, defendant approached James Galason at a hot dog stand on 43rd and Rockwell in Chicago, Illinois and asked him if he was "crazy enough" to kill defendant's wife Joanne. Galason testified that he agreed to do it in exchange for the remainder of insurance money after the victim's funeral expenses were paid. Galason further testified that three days after his initial meeting with defendant, he was walking down the block with his roommates Ken and Joe Beringer when Ken pulled out a picture of defendant's wife and remarked, "We'll see who gets her first." Galason also stated that about two Tuesdays before the homicide, the defendant came to his apartment and implored him to kill his wife soon because she wanted to see a lawyer about a divorce. The defendant asked Galason to shoot her below the neck so there could be an "open coffin wake."

The next time Galason saw the defendant was at 11 p.m. on June 15, 1981, the night before the shooting. Galason, who was seated on the porch at the Chiquet residence at 43rd and

Artesian, flagged down the defendant who was driving down the street. The defendant gave Galason a ride home. Galason testified that while in the car, the defendant told him that he had the murder planned for the following day because his wife would be walking on 42nd and Artesian to the bus stop and he would be driving to Skokie on business and would therefore have a good alibi. Galason further testified that the defendant told him to say it was a robbery if he got caught since his wife usually carried a lot of money and wore expensive jewelry.

At approximately 4:30 a.m. on July 16, 1981, Joe and Ken Beringer woke Galason to tell him that they had stolen a getaway car to use for the murder. The three men then had an argument over who was going to do the shooting and Joe finally agreed to do it. Three hours later, the defendant arrived at Galason's home and stated, "Let's go, let's go, we got to do it now ***"because his wife was going to see her lawyer that day. Ken Beringer decided not to go, but Joe Beringer picked up a .16 gauge sawed-off shotgun and left with Galason.

Galason testified that the defendant drove him and Joe Beringer to 47th and Western where the stolen car was located. After the defendant reminded them to tell Ken Beringer to destroy his wife's picture, he drove to Skokie. Galason drove the stolen car to an alley near 42nd and Artesian to wait for the defendant's wife. Galason stated that Joe Beringer exited the car and hid by a garage until she appeared. As the victim walked past the alley, Beringer jumped out and shot her twice. He returned to the car and Galason drove it to 49th and Rockwell where they hid the gun in some weeds near the railroad tracks. The two started to walk in different directions when a squad car pulled up and an officer questioned Joe Beringer. At that point, Galason ran toward his home. A few

minutes later, the police entered Galason's residence and placed him and Ken Beringer under arrest. Galason confessed to the crime the same day and indicated the killing was done at the request of the defendant. Shortly thereafter, the defendant and Joe Beringer were arrested.

Officer Joe Mikulskis of the Chicago Police Department, who was the first officer on the scene, testified that he took a brief statement from Harvey Webb, an eyewitness to the shooting. Webb did not testify in the defendant's trial which began January 25, 1983, however, he testified at the Beringer brothers' joint trial two months later.

The defendant testified that he did not know Ken and Joe Beringer and had no idea how his wife's photograph got in their possession. He further testified that he met James Galason on July 4, 1979, as a result of a dispute over fireworks. He thereafter began to see Galason because Galason was dating the daughter of Carmen Jagazynski, defendant's friend and insurance client. The defendant admitted that he gave Galason a ride home on the night before the shooting, but he stated that their conversation involved whether defendant's wife would be going to Skokie with him the next day and whether Galason would purchase defendant's motorcycle.

Defendant also testified that at approximately 11:30 a.m. on the day of the homicide, he arrived at Holy Cross Hospital where his wife had been taken. At the hospital, he volunteered to Officer Thomas Ptak that he loved his wife, and "turned frantic" when he learned of her death. The defendant subsequently told the police that a possible explanation for his wife's murder was that she carried a great deal of jewelry and that there was a rumor in the neighborhood that he and his wife

had "a lot of money." His wife, however, was found with jewelry on her person and over $50 in her purse.

I.

Defendant initially argues that he is entitled to a new trial because the prosecution failed to disclose favorable information within its possession prior to or during defendant's trial denying him due process of law. (*Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1994, 10 L.Ed.2d 215.) We disagree.

The record reflects that defendant made a similar argument on April 4, 1983, in support of his motion for a new trial. On that day, defense counsel presented the trial court with a transcript of Harvey Webb's testimony on march 25, 1983, in the Beringer trial in which he identified James Galason as the shooter of defendant's wife. Defense counsel contended that the prosecution violated *Brady v. Maryland* by failing to disclose this information prior to or during defendant's trial since it would have impeached the credibility of Galason who testified at defendant's trial that it was Joe Beringer who pulled the trigger. The trial court determined that the prosecution had two contacts with Harvey Webb; the first was a phone call and the second was a meeting on February 21, 1983. Based on Webb's "two positive assertions" at the Beringer trial, the court found that it was at the February 21 meeting that Webb observed photographs of Galason and Beringer and identified Galason as the shooter. The trial court therefore denied defendant's motion reasoning that the prosecution was under no duty to disclose this information because it was not within the prosecution's control until after the conclusion of defendant's trial on February 2, 1983.

Defendant now maintains that the trial court was not presented with particular statements made by the prosecutor during proceedings in the Beringer trial on March 14, 16 and 25, 1983, which would establish that the prosecution did in fact meet with Webb prior to or during defendant's trial. In the March 14 proceeding, defense counsel for Joe Beringer asked the prosecution if it had a current address for Harvey Webb. The prosecutor responded that no one from the State's Attorney's office had spoken to Webb since prior to the Barkauskas trial, perhaps November or December of 1982. On March 16, 1983, in pretrial proceedings in the Beringer case, defense counsel for Joe Beringer stated that Harvey Webb had indicated to several people that in February 1983 he had been interviewed by an assistant State's Attorney at which time he identified Galason as the shooter. The prosecutor then asserted that he had talked to Webb a couple of times, most recently before the Barkauskas trial, and as far as he knew, Webb had only identified Joe Beringer as the killer. The portion of the March 25, 1985, transcript in the Beringer trial not presented to the trial court discloses that the prosecutor "wasn't sure of the exact date" he met with Webb, but thought it was in January 1983.

[1] After reviewing the proceedings in the Beringer case, we find no reason to disturb the trial court's determination that Webb identified Galason as the shooter for the first time on February 21, 1983. There is no indication from the transcripts now before us that the prosecution possessed any information with respect to Webb's identification of Galason prior to or during defendant's trial. The transcripts simply reveal that the prosecution was uncertain as to the date of its meeting with Webb. The trial court, in light of Webb's two positive assertions at the Beringer trial, resolved the issue by determining

that the meeting took place on February 21, and therefore properly denied defendant's motion for a new trial.

[2] Even assuming that the prosecution possessed this information prior to our during defendant's trial, the prosecution was under no duty to disclose it. In order to establish a *Brady* violation, "it must be shown that the evidence was suppressed following a request for it by defendant and that the evidence was favorable to defendant and material either to guilty or to punishment." (*People v. Kosik* (1982), 110 Ill.App.3d 930, 940, 66 Ill.Dec. 555, 443 N.E.2d 238.) Materiality in a constitutional sense is not the mere possibility that the undisclosed information might have helped the defense or affected the outcome of the trial. (110 Ill.App.3d 930, 66 Ill.Dec. 555, 443 N.E.2d 238; *People v. Williams* (1980), 91 Ill.App.3d 631, 47 Ill.Dec. 119, 414 N.E.2d 1235.) Rather, omitted evidence is material if, when evaluated in the context of the entire record, it creates a reasonable doubt of the defendant's guilt. *United States v. Agurs* (1976), 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed2d 342; *People v. Kosik* (1982), 110 Ill.App.3d 930, 66 Ill.Dec. 555, 443 N.E.2d 238.

We have reviewed the record on appeal and are convinced that the information allegedly withheld by the prosecutive, even if presented to impeach the credibility of James Galason, does not raise reasonable doubt of defendant's guilt. While the information may be relevant to the guilt or punishment of Galason, it in no way rebuts his testimony and the independently corroborated evidence discussed below that the defendant conspired to murder his wife. Thus, the information is immaterial to defendant's guilt or punishment, and accordingly, no *Brady* violation has been demonstrated.

II.

Defendant next claims that he was not proven guilty of his wife's murder beyond a reasonable doubt because the State's case was based solely on the uncorroborated testimony of a "pathological liar," James Galason, who traded his story for a light prison sentence." The evidence reveals, however, that Galason confessed to the crime and implicated defendant on the day of the homicide, prior to receiving any promises of leniency from the prosecution. Moreover, it is well established that the determination of the credibility of witnesses is a function of the jury, and this court will not disturb a jury's decision to convict unless the evidence is so improbable as to leave a reasonable doubt of the defendant's guilt. (*People v. Carlson* (1980), 79 Ill.2d 564, 38 Ill.Dec. 809, 404 N.E.2d 233.) Here, we find no reason to reverse the jury's verdict.

We initially note that this case was submitted to the jury with proper instructions setting forth the theory of accountability. A person is legally accountable for conduct of another when:

"Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Ill.Rev.Stat.1985, ch. 38, par. 5-2(c).

[3] Under the principle of accountability, the ample evidence in this case based on James Galason's corroborated testimony establishes defendant's guilt in the murder of his wife. Defendant's admission that he met with Galason on the eve of the murder, the fact that Galason and Beringer knew precisely

where the victim would be walking the morning of the homicide, Galason's ability to accurately describe defendant's clothing on the day of the murder corroborated by Officer Thomas Ptak's and defendant's testimony, and Officer Ptak's discovery of a photograph of defendant's wife in the Galason and Beringer apartment, which defendant claimed he lost or was stolen, sufficiently prove defendant's involvement. Furthermore, defendant's "volunteered" statement to Ptak that the crime was motivated by robbery, although the evidence indicated otherwise, corroborates Galason's testimony that that was what defendant requested he tell the authorities if he got caught. Therefore, defendant's argument that he was not proven guilty beyond a reasonable doubt must fail.

III.

Defendant further maintains that he was denied a fair trial because of allegedly prejudicial comments made by the prosecutor during the rebuttal argument and examination of two witnesses. Defendant first challenges the prosecutor's implication in rebuttal that defendant and his wife were having marital problems and the prosecutor's characterization of defense counsel as a "director" of manufactured testimony.

In considering defendant's contentions, we note that a prosecutor is allowed great latitude in closing argument, and absent an abuse of discretion, the trial court's determination as to the propriety of the comments made will be followed. (*People v. Maldonado* (1981), 101 Ill.App.3d 948, 57 Ill.Dec. 407, 428 N.E.2d 1087.) Moreover, a defendant cannot claim prejudice if a prosecutor's remarks are either made in response to those of defense counsel (*People v. Smith* (1982), 111 Ill.App.3d 895, 67 Ill.Dec. 565, 444 N.E.2d 801), or are a

comment on the evidence. *People v. Bloodworth* (1979), 68 Ill.App.3d 341, 24 Ill.Dec. 763, 385 N.E.2d 904.

[4, 5] Here, defense counsel argued in closing that defendant had a good marital relationship and the prosecution failed to produce one witness to corroborate Galason's testimony that defendant told him his wife wanted a divorce. Thus, the prosecutor's comments that he was precluded from questioning the victim's father about his daughter's marriage and that he was unable to contact the victim's divorce attorney were invited by the defense, and as such, were proper. Furthermore, in both instances, defendant's objections were sustained and the jury was instructed to disregard any arguments by counsel which were not based on the evidence. Consequently, any alleged harm was alleviated by the trial court's actions. *See People v. Clay* (1984), 124 Ill.App.3d 140, 79 Ill.Dec. 375, 463 N.E.2d 929.

[6] We also find no resulting prejudice in the prosecutor's reference to defense counsel as a "director." The record reflects that Harriet Ermel, defendant's next door neighbor, testified that defendant and his wife had an argument on the night before the murder during which defendant states, "Wait until tomorrow." Defendant testified, however, that his words were, "Can't this wait until tomorrow," referring to the argument itself. The prosecutor subsequently commented in rebuttal argument on how defendant found "some words that would fit into the State's case" which would make his statement to his wife seem innocuous. We believe that the prosecutor's argument was a proper comment on the evidence and the credibility of defendant as opposed to an accusation that defense counsel fabricated a defense and encouraged defendant to testify accordingly.

Defendant next contends that the prosecutor's redirect examination of James Galason and cross-examination of Mary Beth Letz, Galason's probation officer, were improper. With respect to the examination of Galason, defendant argues that the prosecutor erroneously bolstered his testimony by eliciting his prior consistent statements to an assistant State's Attorney on the day of his arrest.

[7] Generally, a witness' prior consistent statements are inadmissible to corroborate his testimony at trial. (*People v. Fayson* (1985), 131 Ill.App.3d 517, 86 Ill.Dec. 566, 475 N.E.2d 945.) An exception exists where such statements are offered to rebut a charge or inference that a witness is motivated to testify falsely or that hist testimony is a recent fabrication. (*People v. Jackson* (1983), 119 Ill.App.3d 951, 75 Ill.Dec. 891, 458 N.E.2d 59.) In this case, the record reveals that defense counsel questioned Galason extensively on cross-examination about alleged inconsistencies in his trial testimony and statements he made previously in his confession. Defense counsel also stated to Galason, "***you didn't make any statements until you made a deal for twenty years before you would talk to the State's Attorney ***." To refute these assertions of fabrication, the prosecutor properly rehabilitated Galason with his prior confession.

[8] Regarding the cross-examination of Letz, defendant argues that it was improper for the prosecution to ask whether she knew "that when James Galason was arrested, he told the police who hired him to kill Joanne Barkauskas ***." The trial court sustained defense counsel's objection, and as, discussed above, the cautionary instruction given to the jury was sufficient to cure any prejudice.

[9] Even assuming that any of the foregoing remarks by the prosecutor were error, we do not believe in light of the overwhelming evidence of defendant's guilt that they were so prejudicial as to have been a material factor in defendant's conviction or to have denied him a fair trial. *See People v. Jackson* (1981), 84 Ill.2d 350, 49 Ill.Dec. 719, 418 N.E.2d 739.

IV.

[10] We further reject defendant's claim that the trial court erred in its ruling concerning James Galason's mental health records from Old Orchard Hospital. Defendant sought to subpoena the records from the hospital and use them to impeach Galason's testimony at trial. Old Orchard Hospital and counsel for Galason, however, objected to the production of the confidential information. Consequently, the trial court conducted an *in camera* inspection of the records outside the presence of the prosecutor and defense counsel, and released the relevant portion of the material consisting of a three-page discharge summary. Defendant contends that by conducting the *in camera* examination in the manner in which it did, the court deprived him of a fair trial under the sixth and fourteenth amendments of the United States Constitution and sections 2 and 8 of article 1 of the 1970 Illinois Constitution and, further, that its action was violative of the provisions of Supreme Court Rule 412(h). Ill.Rev.Stat.1981, ch. 110A, par. 412(h).

Defendant's reliance on *People v. Phipps* (1981), 98 Ill.App.3d 413, 53 Ill.Dec. 936, 424 N.E.2d 727, and *People v. Dace* (1983), 114 Ill.App.3d 908, 70 Ill.Dec. 684, 449 N.E.2d 1031, to support his argument that Galason's records should have been examined in an *in camera* hearing attended by counsel for both parties to determine what information would be

relevant and material to his credibility is misplaced. In *Phipps*, the defendant was charged with battery and maltreatment of mentally retarded people who were witnesses in the case. These witnesses, whose mental health records the defendant sought to obtain, suffered from psychiatric disorders so severe that they were long-term residents of a mental hospital and were in the institution at the time of the offense and at the time of the trial. The court directed the trial court to issue subpoenas to the mental health facility and, in the event either a therapist or patient invoked a privilege, directed the trial court to hold *in camera* hearings with attorneys for the State and defendant present.

In *Dace*, the State's chief witness had been previously committed to a mental hospital involuntarily. The trial court, *in camera*, reviewed the file from the witness' commitment proceedings which contained information that she was found to be mentally ill and dangerous, but no mention was made of her diagnosis, treatment or release. On this basis, the trial court ruled that the records were privileged and too old to be relevant. The trial court also barred the defendant from questioning the witness on her mental history. The appellate court held that the trial court could not reasonably conclude from the information before it that the health history of the witness was irrelevant and immaterial, and therefore remanded the case with directions to the trial court to conduct an *in camera* hearing with counsel for both parties if the defendant's requested discovery is challenged.

In the case at bar, 1 ½ years prior to the offense, Galason was voluntarily admitted by his parents to Old Orchard Hospital where he remained for six months. Unlike the witnesses in *Phipps*, he was not hospitalized at either the time of the murder, the time of defendant's trial, or during the intervening period.

While Galason's records from Old Orchard Hospital were not included in the record before us, it appears that he was evaluated as a non-psychotic and that a diagnosis of his mental health was made. Thus, in contrast to the trial court in *Dace*, the court here had sufficient information to determine what was relevant to Galason's credibility. Moreover, in both *Dace* and *Phipps*, the trial courts refused any discovery to the defendants regarding the mental health records of the witnesses, whereas in this case, the court conducted an *in camera* examination of Galason's records, provided both parties with a three-page summary of their contents, and permitted defense counsel to question Galason regarding his stay at Old Orchard Hospital.

The determination of whether material is discoverable and subject to disclosure is to be made by the trial court. (*People v. Coates* (1985), 109 Ill.2d 431, 94 Ill.Dec. 421, 488 N.E.2d 247; *People v. Stevens* (1981), 102 Ill.App.3d 773, 58 Ill.Dec. 389, 430 N.E.2d 331.) The procedure followed by the trial court in this case adequately protected defendant's right to a fair trial and at the same time, observed the hospital's and Galason's right to confidentiality in the non-material information contained in the mental health records. *People v. Stevens* (1981), 102 Ill.App.3d 773, 775, 58 Ill.Dec. 389, 430 N.E.2d 331; *People v. Ator* (1976), 37 Ill.App.3d 304, 309, 345 N.E.2d 211.

V.

(11] We next consider defendant's argument that he was denied effective assistance of counsel because his attorney failed to sufficiently investigate when the prosecution learned of Harvey Webb's identification of Joe Beringer as the killer. Although defense counsel presented the court with Webb's

testimony at the Beringer trial during defendant's motion for a new trial, counsel neglected to tender transcripts of additional proceedings on March 14, 16 and 25, 1983, in the Beringer case. Defendant maintains that if these transcripts had been provided, the trial court would have granted his motion. Given our finding above that the additional information would not have altered the trial court's decision to deny defendant's motion, we conclude that defendant did not establish that his counsel's alleged inadequate representation affected the outcome of his trial. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

VI.

Defendant further maintains that the trial court improperly refused to tender two instructions to the jury. The first of these instructions would have charged the jury that "witness James Galason is a narcotics addict and his testimony is subject to suspicion due to the fact that habitual users of narcotics become notorious liars." We find no error in the trial court's refusal to give this non-pattern instruction.

The decision whether to give a non-pattern instruction rests within the discretion of the trial court. (*People v. Larson* (1980), 82 Ill.App.3d 129, 37 Ill.Dec. 730, 402 N.E.2d 732). Moreover, it is settled that an instruction on the credibility of a narcotics addict is improper where it contains an incorrect statement of law (*People v. Phillips* (1970), 126 Ill.App.2d 179, 261 N.E.2d 469), or if there is insufficient evidence to indicate a witness' addiction to narcotics. *People v. McVay* (1981), 98 Ill.App.3d 708, 54 Ill.Dec. 172, 424 N.E.2d 922.

[12] In the present case, no evidence was produced at trial to support the conclusion that Galason was a "habitual user of narcotics." Galason merely stated that he drank alcohol, smoked marijuana occasionally, and did not consume pills or other drugs. Thus, the jury was made aware of any drug use by Galason and was able to consider its effect on his credibility, as the standard instruction given on witness credibility instructs them to do. Illinois Pattern Jury Instructions (IPI), Criminal, No. 1.02 (2d ed. 1981).

Defendant also contends that IPI Criminal No. 3.16 was improperly given to the jury. The instruction reads:

> "The defendant has introduced evidence of his reputation for truth and veracity. This evidence may be sufficient when considered with the other evidence in the case to raise a reasonable doubt of the defendant's guilt. However, if from all of the evidence in the case you are satisfied beyond a reasonable doubt of the defendant's guilt, then it is your duty to find him guilty, even though he may have a good reputation for truth and veracity." Illinois Pattern Jury Instructions (IPI), Criminal, No. 3.16 (2d ed. 1981).

Defendant argues that because the State alleged his motive to kill his wife was marital problems, the following modified version of IPI Criminal N. 3.16 should have been given:

> "The defendant has introduced evidence of his reputation as a faithful and loving husband. This evidence may be sufficient when considered with

the other evidence in this case to raise a reasonable doubt of the defendant's guilt."

[13] It is apparent that defendant's instruction is not merely a modified version of IPI Criminal No. 3.16 as he alleges, but rather a separate non-pattern jury instruction. As previously noted, the decision whether to give a non-pattern instruction is within the sound discretion of the trial court, and once again, we find no abuse of that discretion here.

A review of the record discloses that none of the witnesses mentioned by defendant in his brief testified to defendant's reputation as being a "faithful and loving husband." Rather, they offered their personal opinions based on their own observations of defendant's marital bliss. As such, the proposed instruction was not supported by the evidence. Moreover, even if we were to consider defendant's instruction a form of IPI Criminal No. 3.16, our research has revealed no case which has held that being a "faithful and loving husband" is an appropriate character trait to be included in that instruction.

[14] Even assuming error occurred when the trail court refused to tender defendant's non-pattern jury-instructions, reversal is not required unless defendant was so prejudiced as to affect the jury's verdict. (*People v. Bertucci* (1980), 81 Ill.App.3d 851, 37 Ill.Dec. 30, 401 N.E.2d 1123.) Defendant has failed to demonstrate that any such prejudice resulted in this case.

VII.

[15] Lastly, defendant urges that his sentence to natural life in prison is excessive and should be reduced to thirty years.

In support of this argument, defendant asserts that he was 26 years old at the time of sentencing, was employed at the time of his arrest, and complied with the bond conditions for two robbery convictions in 1976.

Our examination of the record before us reveals that the trial court thoroughly considered those factors now articulated by defendant as well as other mitigating evidence that was presented. The court, however, properly weighed against these factors the necessity of an adequate punishment for the crime committed. In this regard, the court found that defendant "in a cold and calculating way did spearhead the tragic events" leading to his wife's murder. The court also found that the confessions of Joe and Ken Beringer introduced in aggravation supported the "***depth of the culpability of defendant," particularly where Joe Beringer stated that defendant told him to make sure his wife was dead and that any left over insurance money would be his and Galason's.

The imposition of a sentence is within the discretion of the trial court (*People v. Almo* (1985), 108 Ill.2d 54, 70, 90 Ill.Dec. 885, 483 N.E.2d 203), and absent an abuse of that discretion, this court cannot modify the sentence. *(People v. Cox* (1980), 82 Ill.2d 268, 280-81, 45 Ill.Dec. 190, 412 N.E.2d 541.) In the present case, the crime was of a particularly heinous nature and we conclude that the trial court did not abuse its discretion in sentencing defendant to life imprisonment.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.
CAMPBELL and O'CONNOR, JJ., concur.

APPENDIX B:

MEMORANDUM AND ORDER, UNITED STATES DISTRICT COURT JUDGMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. EDWARD BARKAUSKAS,	)	
Petitioner,	)	
v.	)	No. 87 C 9377
MICHAEL P. LANE, Director, Illinois Department of Corrections, and JAMES FAIRMAN, Warden, Joliet Correctional Center,	)	
Respondents.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Petitioner Edward Barkauskas was convicted of murder, armed violence, solicitation and conspiracy and was sentenced to a term of natural life imprisonment for murder. In a post-trial proceeding, petitioner introduced testimony from a subsequent trial involving other defendants, allegedly proving that the prosecution withheld from petitioner evidence favorable to petitioner's defense in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The trial court denied the motion, petitioner appealed and his conviction was affirmed.[1] Petitioner

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[1]Petitioner unsuccessfully sought leave to appeal to the Illinois Supreme Court, thereby exhausting all available state

now seeks federal habeas relief under 28 U.S.C. § 2254(a) (1982). For the reasons stated below, the petition is denied.

I

Petitioner was arrested on July 16, 1981, in connection with the shooting death of his wife. Three other men, Joseph Beringer, Kenneth Beringer and James Galason, allegedly hired by petitioner to commit the murder, were also charged. The state tried petitioner separately, relying principally upon the testimony of James Galason. Galason testified that petitioner solicited Galason and the two Beringer brothers to kill petitioner's wife in exchange for the proceeds of a life insurance policy. Galason further testified that it was Joseph Beringer who actually shot the victim.

Petitioner was convicted on February 2, 1983. On March 23, 1983, Harvey Webb, an eyewitness to the shooting, testified at the trial of Joseph and Kenneth Beringer that Galason, not Joseph Beringer, fired the shots that killed petitioner's wife. Webb also testified that he identified Galason as the assailant at a February 21, 1983 meeting attended by Assistant State's Attorney Kenneth Wadas, the prosecutor at petitioner's trial. Webb was not available to testify at petitioner's trial, but he had been in contact with Wadas prior to the trial. On April 4, petitioner moved for a new trial, claiming that the prosecution's failure to inform petitioner that Webb identified Galason as the assailant denied petitioner material information that he could have used at trial to impeach Galason.

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court remedies in satisfaction of 28 U.S.C. § 2241(d).

The trial court believed Webb's testimony as to the contents of the February 21 meeting but denied petitioner's motion on the grounds that while the information would tend to negate petitioner's guilt, the prosecution was under no duty to disclose information that they did not possess until February 21, nineteen days after the conclusion of petitioner's trial.

On appeal, petitioner renewed his *Brady* claim introducing additional transcripts from the Beringer trial which suggested that Webb identified Galason prior to the February 2 completion of petitioner's trial. Specifically, Wadas testified that he was unsure of the precise date of his meeting with Webb, but he was certain that the meeting occurred sometime before the start of petitioner's trial, and that Webb identified Joseph Beringer, not Galason, as the assailant.[2] After

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[2]The relevant portions of Wadas' testimony are as follows:

THE COURT: I think the question is, do you have another address on Webb now?

MR. WADAS: No. No one from the State's Attorney's Office has spoken to Mr. Webb in months.

THE COURT: I assume anybody working for Richard M. Daley has not spoken to Mr. Harvey Webb?

MR. WADAS: That is correct. It was before the other trial.

[?]: When was that?

MR. VERDUN: That was in January.

MR. WADAS: I think it was December or November when I talked to him.

MS. PLACEK: The last time anyone from the State's Attorney's Office spoke to Mr. Webb?

MR. WADAS: I believe so.

* * *

MS PLACEK: As far as you are concerned...you haven't spoken or nor has anyone from the State's Attorney's Office spoken to him since early December.

MR. WADAS: Since some time prior to the start of the Barkauskas trial. I don't exactly know when it was we talked to him, but before that trial started.

Supplemental Record, March 14, 1983, at 207-09.

THE COURT: Did you or anybody talk to Webb, or did you know whether or not anybody did?

MR. WADAS: We have talked with Webb a couple of times.

THE COURT: Do you know the last time you talked to Webb?

MR. WADAS: The last time I talked to Webb, I don't remember the date. It was before the Barkauskas case went to trial.

* * *

THE COURT: Do you know whether or not Mr. Webb identified any person other than Joseph Beringer as the shooter?

MR. WADAS: As far as I know, Joseph Beringer is the only person he ever identified as the shooter.

Id., March 15, 1983, at 279-81.

MR. WADAS: The representation that I made to the Court was that when I talked to Harvey Webb, when I saw Harvey Webb it was not before, sometime before the first of the year. It was a date before the Barkauskas trial. It was before we started the Barkauskas trial. I wasn't sure of

reviewing the additional transcripts, the state appellate court denied petitioner's claim, finding no reason to disturb the trial court's determination that Webb identified Galason for the first time on February 21. *People v. Edward Barkauskas*, 147 Ill.App.3d 360, 497 N.E.2d 1183, 1187 (1st Dist. 1986). Petitioner now seeks federal habeas relief charging a *Brady* violation founded on this same testimony. Based on the factual findings of the state courts, we deny the petition.

II

The federal habeas statute mandates that we presume as correct any state court factual findings "evidenced by a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C. § 2254(d). *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854 (1985). This presumption is overcome if we conclude on the basis of the state court records that the "factual determination is not fairly supported by the records." § 2254(d)(8). We must carefully scrutinize the record to assure that any state court factual findings that we accept and apply without our own evidentiary hearing are supported by the evidence presented to the state court. *Demps v. Wainwright*, 805

> the exact date, I said it might have been January, it might have been December. In fact, Mr. Webb authenticated the fact that it could have been January, could have been February and I am contending that it was January.

id., March 25, 1983, at 1534.

F.2d 1426 (11th Cir. 1986), cert. denied sub nom., *Demps v. Dugger*, 108 S.Ct. 209 (1987).

Under *Brady*, the prosecution must provide to a defendant any information that it possesses prior to or during defendant's trial that is favorable and material to the defense. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. The central factual dispute here is whether the prosecution possessed such information prior to the completion of petitioner's trial on February 2, 1983. The state trial court found upon Webb's testimony that Webb observed photographs of Galason and Beringer and identified Galason as the assailant on February 21. This finding was based solely on a credibility determination which we are admonished to accept in habeas proceedings. Nothing in the record before us tends to refute that factual finding.

The record also supports the state appellate court's decision to uphold this factual finding despite the additional testimony of Wadas from the Beringer trial. While Wadas' testimony as to the date of his meeting with Webb may challenge the trial court's factual finding that Webb identified the assailant *after the petitioner's trial*, it does not call into question the trial court's more important factual finding that the prosecution did not possess information that Webb *identified Galason* prior to petitioner's trial. Whether Wadas' testimony in its entirety is viewed as true or as untrue, it provides no basis for upsetting the trial court's decision.

Conclusion

The record _____ supports the state court's factual finding that the prosecution did not possess the allegedly

material information prior to the conclusion of petitioner's trial. Accordingly, there is no *Brady* violation, and the habeas petition is denied. It is so ordered.

MARVIN E. ASPEN
United States District Judge

DATED: 3/22/88

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

JUDGMENT IN A CIVIL

CASE
U.S.A. ex rel.
Edward Barkauskas

v.

Michael P. Lane, et al. **CASE NUMBER:** 87 C 9377

❒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

❒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petitioner's petition for federal habeas relief under 28 U.S.C. §2254(a) (1982) is denied.

March 22, 1988
Date

H. STUART CUNNINGHAM
Clerk

Gladys Lugo

APPENDIX C:

FEDERAL REPORTER,
CASE REVIEW OF *Edward Barkauskas v. Michael P. Lane*,
876 F.2d 1031 (7th Cir. 1989)

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

EDWARD BARKAUSKAS,	)	
	)	No. 88-1877
Petitioner-Appellant,	)	
	)	Argued Feb. 28,
v.	)	1989.
	)	
MICHAEL P. LANE,	)	Decided July 11,
Director, Illinois Department	)	1989.
of Corrections, and JAMES	)	
FAIRMAN, Warden, Joliet	)	Rehearing Denied
Correctional Center,	)	Sep. 11, 1989.
	)	
Respondents-Appellees.	)	

Habeas petitioner convicted in Illinois court of murdering his wife sought habeas corpus relief. The United States District Court for the Northern District of Illinois, Marvin E. Aspen, J., denied petition, and appeal was taken. The Court of Appeals, Posner, Circuit Judge, held that remand was required to determine whether prosecutor knew before petitioner's trial that state witness had identified accomplice informer at lineup as triggerman and had withheld this information from defense.

Reversed and remanded with directions.

1. Criminal Law 700(4)

Brady principle that requires prosecution to disclose exculpatory materials upon request extends to materials that would tend to exculpate defendant by undermining credibility of government witness.

2. Habeas Corpus 864(1)

Remand of habeas case was required to determine whether prosecutor knew before petitioner's murder trial that state witness had identified accomplice informer at lineup as triggerman and had withheld this information from defense, where state court record was too sparse to enable informed judgment.

Richard F. Faust, Chicago, IL, for petitioner-appellant.

Sally L. Dilgart, Chicago, IL, for respondents-appellees.

Before POSNER, RIPPLE and MANION, Circuit Judges.

POSNER, Circuit Judge.

An Illinois jury convicted Edward Barkauskas of murdering his wife, and the judge sentenced him to prison for the rest of his life. After exhausting his state remedies, see *People v. Barkauskas*, 147 Ill.App.3d 360, 100 Ill.Dec. 821, 497 N.E.2d 1183 (1986), cert. denied by Ill.Sup.Ct., Barkauskas sought federal habeas corpus, which was denied. The question presented by his appeal is whether the prosecutor at Barkauskas's criminal trial withheld material evidence favorable to the defense.

The main witness against Barkauskas was James Galason, an eighteen-year-old former mental patient. A participant in the murder, he testified as follows in exchange for receiving a sentence of twenty years for his part in the crime. Barkauskas had asked Galason to murder Barkauskas's wife, Joanne; and Galason had agreed to do so in exchange for a

promise of the balance of a life insurance policy on Joanne, minus funeral expenses. Several days after the deal was struck, as Galason and his roommates, Kenneth and Joseph Beringer, were walking down the street, Kenneth pulled out a photograph of Joanne and said, "We'll see who gets her first." Later Barkauskas requested Galason to shoot Joanne below the neck so that she could have an open-casket funeral. Thus does life imitate art; for Othello had told the sleeping Desdemona, "Be thus when thou art dead, and I will kill thee, / And love thee after."

On the eve of the murder Barkauskas gave Galason a ride home and told him to kill Joanne the next day as she walked to the bus stop. Early the next morning the Beringer wakened Galason to tell him they had stolen a getaway car. Joseph Beringer agreed to do the actual shooting and armed himself with a sawed-off shotgun. Barkauskas drove Galason and Joseph Beringer (Kenneth decided to stay home) to the place where the getaway car was parked, and then continued on to Skokie to create an alibi.

Galason and Joseph Beringer drove to an alley near the bus stop. Joseph left the car and hid near a garage. As Joanne walked past he shot her twice, then returned to the car and drove off with Galason. They abandoned the car near some railroad tracks and hid the gun in nearby weeds. (All this, we emphasize, is according to Galason.) But it was too late; the car had been noticed at the scene of the crime and followed by the police, who arrested Galason and Joseph Beringer as they were fleeing from the getaway car and recovered Joanne's photograph from their residence.

Barkauskas, testifying in his defense, admitted knowing Galason and giving him a ride home the night before the shooting but denied having hired him to murder Joanne. He also testified that he did not know how the Beringers had gotten a photograph of her, a photograph he claimed never to have seen. After the murder he had told the police that his wife had probably been killed for her jewelry, but no jewelry had been removed from her body and her purse was found with more than $50 in it.

The Beringers were tried shortly after Barkauskas was convicted, and were also convicted. Joseph was sentenced to natural life in prison and Kenneth to thirty years. At their trial the defense called an eyewitness to the murder, Harvey Webb, who had not testified at Barkauskas's trial. Webb testified that James Galason, not Joseph Beringer, had fired the shotgun at Joanne. He said he knew this because Galason had long blond hair which the recoil from the shotgun blast had caused to wave in the air; Joseph Beringer has short brown hair. Webb also testified that it was on February 21--almost three weeks after Barkauskas's conviction--that he had told the prosecutor in the Beringers' case (the same prosecutor who had prosecuted Barkauskas) that Galason was the triggerman.

After learning of Webb's testimony at the Beringers' trial, Barkauskas moved for a new trial. The judge denied the motion after a hearing in which the prosecutor testified that until February 21 Webb had identified only Joseph Beringer as the triggerman, never Galason. In fact Webb had identified Galason as the triggerman much earlier, at a line-up held shortly after the murder, but later Webb had become a fugitive from justice and he did not resurface until after Barkauskas was tried.

At first glance it might seem quite immaterial whether Galason or one of the Beringers was the triggerman, since Galason's testimony was that Barkauskas had hired all three, or at least had hired Galason and authorized him to associate the Beringers with him in the venture. However, if the jury had thought Galason was the triggerman it might have doubted his testimony for two reasons. First, as the triggerman he would be an even more heinous criminal, and perhaps therefore even less worthy of belief than as an accomplice. Second and more important, if he was the triggerman this would give him a strong motive for lying in order to inculpate Barkauskas. He might have been singing to avoid imprisonment for his natural life or even the death penalty, since as the triggerman he might have been a candidate for the death penalty, and if not then certainly for imprisonment for natural life—Joseph Beringer was sentenced to prison for his natural life, the trial judge having disbelieved Webb and concluded that Joseph Beringer was the triggerman. See *People v. Beringer*, 151 Ill.App.3d 558, 562, 104 Ill.Dec. 916, 918, 503 N.E.2d 778, 780 (1987). And unless the jury believed Galason it could not convict Barkauskas. True, Galason's testimony was corroborated by the photograph of Joanne, the circumstances of the murder, and the prior acquaintance between him and Barkauskas; but these pieces of evidence were not enough without Galason's testimony to establish Barkauskas's guilt beyond a reasonable doubt.

[1] The principle that requires the prosecution to disclose exculpatory materials upon request, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963), extends to materials that would tend to exculpate the defendant by undermining the credibility of a government witness. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); *United States v. Douglas*, 874 F.2d 1145,

1163 (7th Cir. 1989); *United States v. Herrera-Medina*, 853 F.2d 564, 567 (7th Cir. 1988). And before his trial Barkauskas had made a general request for exculpatory materials. But he does not argue that the state had a duty to disclose Webb's identification of Galason even if the prosecutor didn't know about Webb's identification till after Barkauskas's trial. And he does not argue that the knowledge possessed by whichever prosecutor was present at the line-up should be imputed to Barkauskas's prosecutor, perhaps he should have argued this. See *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985).

[2] So the only question is whether the prosecutor knew before Barkauskas's trial that Webb had identified Galason at the line-up as the triggerman. The state court's finding that the prosecutor did not know is entitled to deference, but only if "the material facts were...adequately developed at the State court hearing," 28 U.S.C. § 2254(d)(3), a condition that may not have been fulfilled here. Webb had identified Galason as the triggerman at a line-up shortly after the murder, and there was testimony at Barkauskas's trial that Webb had been an eyewitness to the crime. It seems improbable that the prosecutor would not have been informed about the line-up. For far as we are able to determine, however, the question whether he had been informed was not explored at the only evidentiary hearing held on Barkauskas's motion for a new trial, a hearing at which the prosecutor merely stated that until February 21 Webb had identified only Joseph Beringer as the triggerman. If the prosecutor was sincere in saying this, then it means he didn't know about the line-up. He may have been sincere; on the other hand the statement, implying as it did that Webb had consistently identified Joseph Beringer as the triggerman, is perplexing. Webb had just reappeared after being a fugitive;

there was no *history* of his having identified Beringer. As far as we can tell, Webb's only previous identification was of Galason, and occurred at the line-up.

All this is terribly confusing, and especially given the severity of Barkauskas's sentence, would seem to warrant further exploration by the district court, provided we can say that the failure to reveal Webb's identification of Galason to the defense was a material omission, in the sense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley, supra,* 473 U.S. at 682, 105 S.Ct. at 3383. The state argues that Webb's testimony at the Beringers' trial shows that he was unworthy of belief—that he was, as the state had called him then, "a puke" and "garbage." Yet the state took his testimony sufficiently seriously to resort to tactics of impeachment that led the Illinois Appellate Court to reverse the convictions of both Beringers. See *People v. Beringer*, 151 Ill.App.3d 558, 104 Ill.Dec. 916, 503 N.E.2d 778 (1987); *People v. Beringer*, 156 Ill.App.3d 309, 108 Ill.Dec. 882, 509 N.E.2d 578 (1987). Barkauskas's counsel might have been able to use Webb's testimony to impeach Galason effectively.

This is speculation; we expect Barkauskas would have been convicted anyway. The photograph was particularly damaging, and no motive can plausibly be assigned for the crime except on the assumption that Barkauskas indeed hired Galason and his pals to commit it; remember that no effort was made to rob the victim. So even if the jury had doubted Galason's testimony that Joseph Beringer had been the triggerman, it is unlikely that it would have disbelieved his testimony that Barkauskas was behind the murder. Another

point pressed by the state, and corroborated by the transcript of Barkauskas's trial (belatedly submitted to this court by his counsel after oral argument), is that Barkauskas's trial counsel had and used abundant impeaching material on Galason--his prior arrest record, his psychiatric history, his poor reputation for telling the truth, his reluctance to take responsibility for his own actions and concomitant tendency to shift blame to others, and the fact that he was testifying in exchange for a twenty-year sentence that was light in the circumstances. But of course the very abundance of other impeaching evidence may have meant that knowledge of Webb's identification of Galason at the line-up as the triggerman would have pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit Barkauskas.

Although the question is close, we are not able to say that disclosure of Webb's identification would not have been material within the meaning of the Brady line of cases. It therefore becomes critical to determine whether the prosecution concealed this information from the defense, a question on which the state-court record is too sparse to enable an informed judgment. We therefore reverse the judgment of the district court and remand the case for an evidentiary hearing to determine whether the state violated the Brady rule.

REVERSED AND REMANDED, WITH DIRECTIONS.

APPENDIX D:

MINUTE ORDER FORM, REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	Marvin E. Aspen	Sitting Judge/Mag. If Other Then Assigned Judge/Mag.	Elaine E. Bucklo
Case Number	87 C 9377	Date	May 25, 1990
Case Title	U.S.A. ex. rel. Edward Barkauskas v. Michael P. Lane, Director,		
	Illinois Department of Corrections, et al.		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☐ [Other docket entry:]

Enter Report and Recommendation of Magistrate Elaine E. Bucklo regarding Edward Barkauskas' habeas corpus petition.

☐ For further detail, see order attached to the original minute order form

☐ Notices mailed by judge's staff.
☐ Notified counsel by telephone.

4 Number of notices

5-25-90 Date mailed notices.

Courtroom Deputy's Initials:	Date/time received in Central Clerk's Office:	Mailing Deputy's Initials:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. EDWARD BARKAUSKAS,	)	
Petitioner,	)	
v.	)	Case No. 87 C 9377
MICHAEL P. LANE, Director, Illinois Department of Corrections, and JAMES FAIRMAN, Warden, Joliet Correctional Center,	)	
Respondents.	)	

REPORT AND RECOMMENDATION

In February, 1983, a jury convicted Edward Barkauskas of murdering his wife by hiring James Galason, Kenneth Beringer, and James Beringer to kill her in exchange for life insurance proceeds, and he was sentenced to natural life in prison. Mar. Barkauskas exhausted his state remedies, and then filed a federal habeas corpus petition alleging that the prosecutor withheld material information favorable to his defense, specifically that the prosecution was aware that an eye witness, Harvey Webb (who did not testify at Mr. Barkauskas' trial) had identified Mr. Galason as the shooter at a line-up shortly after the murder (at Mr. Barkauskas' trial, Mr. Galason, who testified in exchange for receiving a 20 year sentence, said that Joseph Beringer had done the shooting). Mr. Barkauskas'

habeas corpus petition was denied by the district court, and he appealed to the Seventh Circuit.

The Seventh Circuit noted that at the hearing for a new trial before the trial judge, based on the alleged *Brady*[3] violation, "the prosecutor merely stated that until February 21 Webb had identified only Joseph Beringer as the triggerman." *Barkauskas v. Lane*, 8782d 1031, 1033 (7th Cir. 1989). The court also stated that it was "improbable that the prosecutor would not have been informed about the line-up," *id.*, and concluded that the question of whether the prosecutor had been so informed was not explored at the only evidentiary hearing held on Mr. Barkauskas' motion for a new trial. *Id.* Accordingly, the Seventh Circuit reversed and remanded for the narrow purpose of determining "whether the prosecutor knew before Barkauskas' trial that Webb had identified Galason at the line-up as the triggerman." *Barkauskas v. Lane, supra*, 878 F.2d at 1033.

On remand, this case was referred to me, and on January 11, 1990, I held an evidentiary hearing, at which Mr. Wadas, Mr. Barkauskas' state court prosecutor, and Detective Daniel McWeeny, who had conducted the line-up where Mr. Webb allegedly identified Mr. Galason, testified for the state. Mr. Barkauskas presented no witnesses. Following the hearing, Mr. Barkauskas, through new counsel, moved to reopen the hearing. I granted the motion for the limited purpose of hearing testimony from Mr. Webb. On March 22, 1990, I heard

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[3]In *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), the Court required prosecutors to disclose exculpatory information to a defendant.

testimony from Mr. Webb, and, I now recommend that Mr. Barkauskas's petition be denied.

Detective McWeeny has been with the Chicago Police Department for 21 years, 13 years as a detective. In July, 1981, he was assigned to Area 3 violent crimes, and on July 16, 1981, he became involved with the investigation of Mrs. Barkauskas' murder. That day, he conducted a line-up at the Area 3 violent crimes office at 3900 South California that Harvey Webb viewed. The line-up consisted of James Galason, Ken Beringer, and three police officers, two with blond hair and one with dark hair. Detective McWeeny was with Mr. Webb when he viewed the line-up. January 11, 1990 Tr. at 20-21.

According to Detective McWeeny, Mr. Webb stated that Mr. Galason was one of the occupants of the car. Detective McWeeny prepared and signed a police report on the line-up, dated July 16, 1981 (Defendants' Exhibit 1), which states in relevant part, "[T]he witness WEBB identified the subject GALASON as one of the occupants of the red Camaro." Defendant's Exhibit 1, p. 2. According to Detective McWeeny, Mr. Webb did not identify Mr. Galason as the shooter. January 11, 1990 Tr. at 21. I found Detective McWeeny to be a credible witness.

Ken Wadas testified that he was an Assistant State's Attorney in 1982 and 1983, and conducted the Barkauskas trial in January, 1983. He testified that he reviewed all available police reports for the case, including Defendants' Exhibit 1, and that the July 16, 1981 line-up report was given to the defense. January 11, 1990 Tr. at 37. He also stated that no police officer, nor any other person, told him that Mr. Galason was the shooter. *Id.* Under cross examination, Mr. Wadas stated that he talked

with Mr. Webb two times, the first time being a brief telephone call in October or November of 1982. The second time was an interview, *Id.* at 38, which he believed was before the Barkauskas trial, although he was not certain. *Id.* at 40. He reiterated on re-direct that he was not certain when the second conversation occurred. *Id.* at 53-54.[4]

Mr. Wadas testified that at his interview with Mr. Webb, which took place at the state's attorney's office, he showed Mr. Webb a photo of the line-up to refresh his recollection, because Mr. Webb did not remember viewing the line-up. January 11, 1990 Tr. at 46. According to Mr. Wadas, Mr. Webb stared at the photo, but, "[w]e weren't really getting an answer from him, because he was saying couldn't remember things." *Id.* I found Mr. Wadas' testimony to be credible.

At the March 22 hearing, Mr. Webb testified that on July 16, 1983, he was walking down an alley half a block west of

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[4]Mr. Wadas also clarified his March 16, 1983 statement to Judge Palmer, at a hearing prior to the Beringer trial, that "until February 21 Webb had identified only Joseph Beringer as the triggerman." *Barkauskas v. Lane, supra,* 878 F.2d at 1033. See March 16, 1983 Tr. at 281. In response to a question from the court as to whether Mr. Webb identified any person other than Joseph Beringer as the shooter, Mr. Wadas responded, "As far as I know, Joseph Beringer is the only person he ever identified as the shooter." At the hearing before me, Mr. Wadas stated that at the time he made the statement, he mistakenly thought that at the line-up Mr. Webb had identified Jose Beringer as the shooter, although Joe Beringer was not arrested until a day after Mr. Webb viewed the line-up. January 11, 1990 Tr. at 49-51.

Western Avenue in Chicago, going south toward 42nd Street, when he saw Mrs. Barkauskas walk by at the end of alley. He said that he saw a red Camaro pull up, and he saw a man with long blond hair get out of the driver's side of the car and shoot Mrs. Barkauskas in the back. He said that he also saw a man with brown hair get out of the passenger side of the car at the same time.[5]

According to Mr. Webb, he went to a police station, where he viewed a line-up. He stated that he recognized Defendants' Exhibit 3, a photograph of the line-up introduced by the state during the January 11 hearing, as a picture of the line-up he attended, and he stated that at the line-up he identified the person on the far left of the photograph, Mr. Galason, as the person who shot Mrs. Barkauskas. Tr. 13-14. On direct, Mr. Webb also stated that he met with the state's attorney right after the line-up, who showed him a photo of the line-up, and that he again identified the same person as the shooter. Tr. 14-15. According to Mr. Webb, the state's attorney kept telling him he had identified the wrong person as the shooter, but Mr. Webb insisted that he was correct. Tr. 15.

On cross examination, Mr. Webb testified that at the scene of the crime, he spoke with a police officer who only asked him about the type of car he had seen. Tr. 25, 27. Mr. Webb also stated that he remembered looking at a photograph in the prosecutor's office, but that he did not remember when. Tr. 30. Mr. Webb stated that he did not remember testifying at the Kenneth Beringer trial in March, 1983, and, when portions

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[5]At the trial of James Beringer, Mr. Webb testified that the shooter got out of the passenger side of the car. R. 1439.

of the transcript of his March 25, 1983 transcript (on pages 1490-91) were read to him, he did not remember being asked and answering the questions. Tr. 33. He added, "I can't even remember too much, what happened yesterday." Tr. 34.[6] Later in his cross examination, when asked again if he remembered going to court on this case, he responded, "Sure I do," but when asked when, he stated, "You tell me." Tr. 44. When counsel for the state read additional parts of his March 25, 1983 testimony to him, he again stated that he did not recall giving the testimony. Tr. 34-36, 45-46. Mr. Webb repeatedly said that he did not remember what the prosecutor whom he spoke with looked like, and that he did not remember when he met with him. He also stated that he was not sure if it was a defense or prosecution lawyer who showed him photographs. Tr. 46. Mr. Webb, who was convicted of armed robbery in 1978, also said that he did not cooperate much with police because they use "trickery." Tr. 50.

I found Mr. Webb to be patently unreliable. First, he did not appear completely alert. In addition, his memory appeared very poor. He could remember almost nothing about his role in the investigation of Mrs. Barkauskas' murder other than that he identified Mr. Galason as the shooter at the line-up. This testimony was contradicted both by Officer McWeeny's testimony and by the police report of the line-up introduced into

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[6]The transcript reads, "two months" rather than "too much." The notes of my law clerk and myself indicate he said "too much." Whether Mr. Webb cannot remember what happened yesterday or has perhaps a memory extending somewhat beyond yesterday but less than two months makes no difference in this context.

evidence. He could remember nothing about his testimony at Kenneth Beringer's trial, although it happened two years after he viewed the line-up. Moreover, Mr. Webb's testimony at the hearing that the shooter was the driver of the red Camaro contradicted his trial testimony that the shooter got out of the passenger side of the car, R. 1488. At the hearing, Mr. Webb also said that he was not sure whether it was the prosecution or defense attorneys to whom he had spoken about the photographs of the line-up. The most credible statement made by Mr. Webb, besides his statement that he witnessed the shooting, which I believe, was his acknowledgment that he does not remember even events that happened very recently. I conclude that Mr. Webb's testimony concerning what happened at the line-up is not credible.

There is one further aspect concerning Mr. Webb's testimony at the Beringer trial that I think I should address. Both the Illinois Appellate Court and the Seventh Circuit stated that Mr. Webb testified at the Beringer trial that he picked James Galason out of a line-up as the shooter. *See, e.g., People v. Beringer*, 151 Ill.App.3d 558, 503 N.E.2d 778, 779, 104 Ill.Dec. 916, 917 (1st Dist. 1987) (Webb further testified that later at the police station he picked James Galason out of a line-up as the shooter); *Barkauskas v. Lane, supra*, 878 F.2d at 1033 (in fact Webb had identified Galason as the trigger man much earlier, at a line-up held shortly after the murder). However, a review of Mr. Webb's testimony at the Beringer trial, R. 1477-1531, indicates that he did not testify that he identified Mr. Galason as the *shooter* at the line-up. In fact, Mr. Webb's testimony concerning the line-up was as follows:

Q. (Mr. Stamos) "And eventually you saw a line-up?

A. (Mr. Webb) Right.

Q. I will show you what has been marked as defendant Kenneth Beringer's Exhibit No. 1, 2, 3 for identification and ask you first of all to look at the photos. Have you examined them?

A. Yes sir.

Q. And do you recognize those photos?

A. No, never seen them before.

Q. Do you recognize what is in the photos?

A. Yep.

Q. What is that?

A. Pictures I have seen before, the line-up.

Q. Is that the line-up that you saw?

A. The same line-up.

Q. Comprised of the people that you saw in the line-up on 1, 2, and 3?

A. Yep.

Q. Now, at the line-up at the police station on that date what happened?

A. Well, they asked me could I identify the guy, I said I didn't remember anything, but, you know, the guy had some blond hair like that, told me well that is the guy on the end right there that that was it.

Q. You say they simply told you, they who?

A. The police."

R. 1488-89. As this testimony demonstrates, Mr. Webb did not state that he identified Mr. Galason as the shooter at the line-up. Under cross examination by Ms. Placek, he later reiterated his testimony:

Q. (Ms. Placek) "When did you tell the police about the man with the long blond hair?

A. (Mr. Webb) I didn't necessarily have to say that to them when they showed me the line-up. I said all I remember was the blond hair, I couldn't just point to anyone out like that."

R. 1493.

In fact, Mr. Webb did imply that he identified a photograph of Mr. Galason as that of the shooter, at a February 21, 1983 meeting with State's Attorney Mr. Wadas.

Q. (Ms. Placek) "When did Mr. Ken Wadas show you that picture [of Joseph Beringer]?

A. (Mr. Webb) The date I came to the office.

Q. When?

A. About February 21st.

Q. That was this year, sometime in February of this year?

A. Right.

Q. And what did you say about the picture?

A. I said that wasn't the guy that I saw.

Q. You said that wasn't the guy that you saw?

A. Yes, ma'am.

Q. What did Mr. Wadas say to you?

A. It was.

Q. And what did you say to him?

A. It wasn't.

Ms. Placek: Thank you."

Q. (Ms. Placek) "Now, showing you what has been marked as defendant's -- showing you what's been marked as Group Exhibit, showing you what has been marked as Defendants' Group Exhibit No. 6 which purports to be a picture --...which

purports to be picture of Mr. James Galason, have you ever seen those pictures before?

A. Yes, ma'am.

Q. Where did you see them?

A. The State's Attorney showed them to me.

Q. And what did they say to you when they showed you these pictures?

A. That wasn't the guy.

Q. What did you say to them?

A. I thought it was.

Q. You thought it was the guy with the long blond hair who you saw get out of the car and shoot the lady?

A. Right."

R. 1495-96. Thus, Mr. Webb's testimony indicates that while he did tell the State's Attorney on February 21, 1983, that Mr. Galason was the shooter, he did not testify that he identified Mr. Galason as the shooter at the line-up. In fact, the trial court, when considering Mr. Barkauskas' motion for a new trial, found that:

"[T]he uncontradicted testimony of Harvey Webb an eye witness at the time of the shooting

> of JoAnne Barkauskas, that the State's Attorneys had two contacts with Webb [sic]. The first being a telephone call made by Wadas to Webb, date unknown. And secondly, a conference with the witness Webb at which time, Mr. Wadas and Mr. Malatesta was [sic] present.
>
> At that time, the identity of the shooter was discussed. Mr. Wadas, an Assistant State's Attorney, showed Mr. Webb a photograph, color photograph of Joseph Beringer and Webb said it wasn't the guy he saw. Then Wadas showed Webb a photograph of James Galason and Webb said he thought it was the guy who got out of the car and shot the lady."

R.1824. Judge Palmer, the trial judge, then noted that Mr. Webb stated on both direct examination by Mr. Stamos and on cross-examination by Ms. Placek, that the meeting occurred on February 21, 1983, R. 1825, and concluded that, based on Mr. Webb's two "positive assertions," that Mr. Webb met with the State's Attorney on February 21, 1983, after the Barkauskas trial was concluded.[7] *Id.*

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[7]While not directly at issue in this hearing, Judge Palmer's factual finding that the meeting at the state's attorney's office between Mr. Webb and Mr. Wadas occurred on February 21, 1983, is fairly supported by the state court record and thus must be presumed to be correct under 28 U.S.C. § 2254(d). Moreover, Mr. Wadas' testimony at the January 11, 1990 hearing that he may have met with Mr. Webb before the Barkauskas trial, although he was not certain, is not sufficient to

In reviewing a habeas corpus petition, a state trial court's factual findings are accorded a presumption of correctness. *Ray v. Duckworth*, 881 F.2d 512, 515-16 (7th Cir. 1989); 28 U.S.C. § 2254(d) (in any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct). However, if the reviewing court determines that the record of the state court proceeding shows that the factual determination is not fairly supported by the record, the presumption of correctness may be overcome. 28 U.S.C. § 2254(d)(8).

In this case, the limited issue for which the Seventh Circuit remanded this case is to determine whether the prosecutor knew and failed to disclose to the defense that Mr. Webb had identified Mr. Galason as the shooter at a line-up shortly after the murder. First, I have located no factual finding by the trial court that supports the statement by the Illinois Appellate Court that Mr. Webb identified Mr. Galason as the shooter at the line-up. Judge Palmer made no mention of such an identification, but rather discussed only Mr. Webb's identification of a photograph of Mr. Galason at the State's Attorney's Office on February 21, 1983. Second, as illustrated by Mr. Webb's Beringer trial testimony that is set out above, Mr. Webb did not testify that he identified Mr. Galason as the

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overcome Judge Palmer's finding that the meeting occurred on February 21, 1983, particularly since Judge Palmer was aware that Mr. Wadas was not sure when the meeting took place. R. 1824-25.

shooter at the line-up, but rather said only that "the guy had some blond hair." R. 1488-89. That he did not identify Mr. Galason as the shooter at the line-up is corroborated by the police report of the line-up, Defendants' Exhibit 1, which states that Mr. Webb identified Mr. Galason only as one of the occupants of the red Camaro, and by Detective McWeeny, who testified by Mr. Webb did not identify Mr. Galason as the shooter at the line-up. I conclude that the record of the state court proceeding does not fairly support a conclusion that Mr. Webb identified Mr. Galason as the shooter at the line-up, and, moreover, the evidence presented at the hearing before me supports a conclusion that the appellate court's statement that Mr. Webb identified Mr. Galason at the line-up as the shooter was incorrect. Accordingly, I conclude that Mr. Webb did not identify Mr. Galason as the shooter at the line-up. Thus, the state did not, and could not, fail to disclose such information to Mr. Barkauskas.

Moreover, even if Mr. Webb had identified Mr. Galason as the shooter at the line-up, Mr. Barkauskas presented no evidence that the prosecutor, Mr. Wadas, or any other prosecutor knew of such an identification prior to the Barkauskas trial. The police report of the line-up, which was in Mr. Wadas' possession, states only that Mr. Galason was one of the occupants of the getaway car. Moreover, Mr. Wadas, whose testimony I have found to be credible, testified that no one told him prior to the Barkauskas trial that Mr. Webb had identified Mr. Galason as the shooter at the line-up. Accordingly, I conclude that Mr. Barkauskas has failed to meet his burden of showing that the state failed to disclose material information

favorable to his defense, and I recommend that Mr. Barkauskas' petition for a writ of habeas corpus be denied.

ELAINE E. BUCKLO
United States Magistrate

Dated: May 25, 1990.

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Marvin E. Aspen within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been mailed to:

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APPENDIX E:

MEMORANDUM ORDER, JUDGMENT
IN A CIVIL CASE,
MINUTE ORDER FORM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. EDWARD BARKAUSKAS,	)	
Petitioner,	)	
v.	)	Case No. 87 C 09377
MICHAEL P. LANE, Director, Illinois Department of Corrections, et al.,	)	
Respondents.	)	

MEMORANDUM ORDER

MARVIN E. ASPEN, District Judge:

Petitioner Edward Barkauskas was convicted in the state court of murdering his wife and sentenced to life imprisonment. After he exhausted his state appellate remedies, he petitioned this Court for habeas corpus relief. We denied his petition. The Court of Appeals reversed and remanded for the sole purpose of determining "whether the prosecution concealed [favorable material] information [failure of the prosecution to disclose that Mr. Webb identified Mr. Galason as the shooter] from the defense." We referred this issue to Magistrate Elaine E. Bucklo for the purpose of conducting an evidentiary hearing and making recommendations to the Court.

On May 25, 1990, Magistrate Bucklo filed her Report and Recommendation that this Court again deny Barkauskas' petition for a writ of habeas corpus on the grounds that he failed to meet his burden of showing that the prosecution failed to disclose favorable material information. Barkauskas filed timely written objections to the Magistrate's Report and Recommendation and the respondents filed a written response to the objections.

After a careful review of the Magistrate's Report, Barkauskas' written objections and respondents' response thereto, transcripts of the testimony before the Magistrate and other relevant pleadings, we deny Barkauskas' objections and adopt the Report and Recommendation.

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

U.S.A. ex. rel. Edward Barkauskas	)	
	)	Case No. 87 C 9377
V.	)	
	)	
LANE, et al.	)	

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that we agree with the Magistrate that the evidence shows that Barkauskas has not met his burden of proof on the question of whether the prosecutive concealed favorable material information from the defense. Accordingly, after having

considered testimony and arguments on the issue of concealment as ordered on remand by the Court of Appeals, we deny Barkauskas' petition for habeas corpus relief.

June 21, 1990
Date

H. STUART CUNNINGHAM
Clerk

Gladys Lugo
(By) Deputy Clerk

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	Marvin E. Aspen	Sitting Judge/Mag. If Other Then Assigned Judge/Mag.	
Case Number	87 C 9377	Date	June 21, 1990
Case Title	U.S.A. ex. rel. Edward Barkauskas v. Lane, et al.		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☐ [Other docket entry:]
Enter Memorandum Order: After a careful review of the Magistrate's Report, Barkauskas' written objections and respondents' response thereto, transcripts of the testimony before the Magistrate and other relevant pleadings, we deny Barkauskas' objections and adopt the Report and Recommendation of the Magistrate. We agree with her that the evidence shows that Barkauskas has not met his burden of proof on the question of whether the prosecution concealed favorable material information from the defense. Accordingly, after having considered testimony and arguments on the issue of concealment as ordered on remand by the Court of Appeals, we deny Barkauskas' petition for habeas corpus relief.

☐For further detail, see order attached to the original minute order form

☐ Notices mailed by judge's staff.
☐ Notified counsel by telephone.

4 Number of notices

6-22-90 Date mailed notices.

Courtroom Deputy's Initials:	Date/time received in Central Clerk's Office:	Mailing Deputy's Initials:

APPENDIX F:

FEDERAL REPORTER, CASE REVIEW OF
Edward Barkauskas v. Michael P. Lane, James Fairman, and Neil F. Hartigan

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

EDWARD BARKAUSKAS,	)	
	)	
Petitioner-Appellant.	)	Case No. 90-2703
	)	
v.	)	Argued Feb. 14, 1991
	)	
MICHAEL P. LANE, JAMES FAIRMAN, and NEIL F. HARTIGAN,	)	Decided Nov. 1, 1991
	)	
Respondents-Appellees.	)	

Habeas petitioner convicted in Illinois court of murdering his wife sought habeas corpus relief. The United States District Court for the Northern District of Illinois denied petition, and appeal was taken. The Court of Appeals, Posner, Circuit Judge, 878 F.2d 1031, reversed and remanded with directions. On remand, the District Court, Marvin E. Aspen, J., again denied petition, and petitioner once more appealed. The Court of Appeals, Fairchild, Senior Circuit Judge, held that Six Amendment guarantee of right to effective assistance of counsel applies only to criminal cases and not to petitions for habeas relief, which are civil in nature.

Affirmed.

1. **Habeas Corpus 202, 690**

Sixth Amendment guarantee of right to effective assistance of counsel applies only to criminal cases and not to petitions for habeas relief, which are civil in nature. U.S.C.A. Const. Amend. 6.

2. Criminal Law 641.13(1)

To prevail on "ineffective assistance" claim, defendant must show not only that attorney's performance fell below broad range of competence, but that attorney's performance was prejudicial. U.S.C.A. Const. Amend. 6.

3. Habeas Corpus 690

Failure on part of habeas petitioner's attorney to present any evidence at hearing on remand, and attorney's decision to rely solely on record already established, did not violate petitioner's Sixth Amendment counsel rights, even assuming that such rights applied at civil habeas corpus proceeding, given complete lack of evidence that outcome would have been more favorable to petitioner but for attorney's failings. U.S.C.A. Const.Amend. 6.

4. Criminal Law 641.13(6)

To prevail on "ineffective assistance" claim, defendant must present evidence, and not mere conclusory allegations, that counsel overlooked exculpatory testimony. U.S.C.A. Const.Amend. 6.

Peter J. Bilanzic, James J. Pink (argued), Oak Lawn, Ill., for petitioner-appellant.

Terence M. Madsen, Asst. Atty. Gen., Office of the Atty. Gen., Crim. Appeals Div., Howard J. Pikel, David L. King, Laurie N. Feldman, Kathleen F. Howlett (argued), Cook County State's Attorney's Office, Chicago, ILL., for respondents-appellees.

Before WOOD, Jr., and POSNER, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

FAIRCHILD, Senior Circuit Judge.

Edward Barkauskas was convicted of murder and sentenced to life in prison. After exhausting his state remedies, he petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied it, and Barkauskas appealed. This court reversed and remanded the case to the district court "for evidentiary hearing to determine whether the state violated the Brady rule" (requiring the prosecution to disclose exculpatory materials upon request, *Brady vs. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). *Barkauskas v. Lane*, 878 F.2d 1031, 1034 (7th Cir.1989). After hearing before a Magistrate Judge, the district court again denied Barkauskas' petition, and Barkauskas appealed.

FACTS

Mrs. Barkauskas was shot and killed while walking along the street on the morning of July 16, 1981. Mr. Barkauskas' trial took place from January 25 to February 2, 1983. The principal witness was James Galason, who testified that Barkauskas had hired him to kill her. He obtained the assistance of Joseph and Kenneth Beringer. Galason testified that Joseph shot her. Galason had pled guilty and received a twenty year sentence.

Harvey Webb saw the event, but did not testify at that trial. He testified as a defense witness at the trial of the Beringer brothers in March, 1983. He said that James Galason was the one who fired the shots. He also testified that it was on

February 21 (after the Barkauskas trial) that he had told Mr. Wadas, the prosecutor at both trials, that Galason had done the shooting. He further testified that he attended a line-up at the police station the day of the shooting, and further,

A. Well, they asked me could I identify the guy, I said I didn't remember anything, but you know, the guy had some blond hair like that, told me well that is the guy on the end right there and that was it.

Q. You say they simply told you, they who?

A. The police.

Galason was the person pointed out, but the references to "the guy" were as close as he came to testifying that he told the police that the man he pointed out was the shooter.

Barkauskas filed a motion for a new trial alleging, among other things, that he was not able effectively to impeach Galason at his trial because the state did not tell him that Webb had identified Galason as the triggerman. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The state argued that the prosecutor also did not know that Webb claimed Galason was the triggerman until after Barkauskas' trial. Following an evidentiary hearing, the trial court found that it was on February 21, 1983, after Barkauskas' trial, that Webb told the prosecutor that Galason was the shooter, and that the prosecutor did not know that Webb believed Galason was the shooter until then. Neither the state appellate court nor the district court found any reason to disturb the finding that Webb did not tell the prosecutor that Galason was the gunman before

Barkauskas' trial. *People v. Barkauskas*, 147 Ill.App.3d 360, 100 Ill.Dec. 821, 825, 497 N.E.2d 1183, 1187 (1986).

This court apparently accepted that finding. This court was led to believe, however, that at the line-up, Webb had identified Galason as *the person who fired the shots* (rather than as *one of the occupants of the car*). 878 F.2d at 1033, 1034. Concern that a prosecutor would probably have been informed about the results of a line-up, and that the facts as to Mr. Wadas' knowledge of the line-up may not have been adequately developed in the state court hearing prompted this court to reverse and remand for an evidentiary hearing in the district court. The matter was referred to a Magistrate Judge for hearing and report.

At the hearing, Barkauskas' counsel indicated his belief that the state had the burden on remand and offered no evidence, saying he would rely on the record. The state presented testimony from Chicago Police Detective Daniel McWeeny, who conducted the line-up in question, and from former Assistant States Attorney Kenneth Wadas, the prosecutor at both the Barkauskas and the Beringer trials. McWeeny testified that at the line-up Webb identified Galason as an occupant of the car from which the gunman emerged, not as the gunman. The police report of the line-up, signed by McWeeny, said that Webb "identified the subject Galason as one of the occupants of the red Camaro." Assuming that this report came to the attention of Wadas, it gave him no basis for belief that Webb thought Galason shot the gun. The fact that Webb identified Galason as one of the occupants of the car was consistent with Galason's testimony and would not have been useful to the defense. It was the assumed identification of Galason as the

person shooting the gun that this court thought could have been useful in attacking Galason's credibility.

Wadas testified that at the time of the Barkauskas trial no one had told him that Webb had identified Galason as the shooter. Wadas said that he spoke with Webb twice, and that Webb had never told Wadas that he had identified Galason as the gunman, or that Galason was the gunman. Wadas could not remember whether his second conversation with Webb occurred before or after Barkauskas' trial. At the close of the evidence, the Magistrate Judge asked petitioner's counsel whether there was some reason for not calling Webb and he responded that "Mr. Webb's testimony, I believe, would not be any more, any better than it has been at any other time."

After the hearing, Barkauskas retained new counsel, and his new counsel moved for rehearing and for reopening of the hearing. The motion for rehearing specifically referred to "the critical nature of witness Webb's testimony," but neither motion referred to testimony from other potential witnesses. The Magistrate Judge granted the motion to reopen the hearing, but only to hear testimony from Webb and rebuttal by the state. Webb testified that he had seen Galason shoot Mrs. Barkauskas and that at a line-up on the day of the murder, he had picked Galason out as the gunman. Apart from these assertions, Webb did not remember anything clearly and, in fact, said he had trouble remembering what happened the day before the hearing. In his closing argument after Webb's testimony, Barkauskas' counsel admitted, "[S]o whether or not there was—Mr. Webb identified the shooter at the line-up, I don't believe is relevant. I mean I wish we could prove it, but there's no way we can." He focussed on the issue of whether Webb met with the prosecutor and told him Galason was the shooter before

Barkauskas' trial, but that issue has been resolved by state court findings not questioned by the district court or this court.

Magistrate Judge Bucklo made a carefully detailed Report. She found McWeeny and Wadas credible witnesses. She set forth an analysis of inconsistencies, lapses, and failures of memory by Webb. She found him "patently unreliable" and his testimony concerning the line-up not credible.

She concluded that "[M]r. Webb did not identify Mr. Galason as the shooter at the line-up. Thus, the state did not, and could not, fail to disclose such information to Mr. Barkauskas." Alternatively, she asserted that even if Webb had then identified Galason as the shooter, there was no evidence that Mr. Wadas or any other prosecutor knew that prior to the Barkauskas trial. Accordingly, she concluded that Mr. Barkauskas has failed to meet his burden of showing that the state failed to disclose information favorable to his defense. The district court agreed, adopting the Report and denying the petition for habeas corpus relief.

On appeal, Barkauskas does not challenge the findings as clearly erroneous, but contends that because of deficiencies of his former counsel, he was denied effective assistance of counsel on remand, and that the Magistrate Judge abused her discretion in limiting the second hearing to Webb's testimony, depriving him of due process of law.

DISCUSSION

[1] Barkauskas argues that he was denied his Sixth Amendment right to effective assistance of counsel when his first attorney did not present any evidence at the evidentiary

hearing, even though Barkauskas bore the burden of proof. The Sixth Amendment, however, applies only to criminal cases, and a petition for a writ of habeas corpus is civil in nature. *Wilson v. Duckworth*, 716 F.2d 415, 418 (7th Cir.1983); *Robinson v. Fairman*, 704 F.2d 368, 371 n. 6 (7th Cir.1983); *LaClair v. United States*, 374 F.2d 486, 488-89 (7th Cir.1967). Cf. *Williams v. Chrans*, 945 F.2d 926, 933 (7th Cir.1991) (no constitutional right to the assistance of counsel in a state collateral proceeding).

[2] Even if the amendment were applicable, Barkauskas would have to show not only that his former counsel's performance fell below the broad range of competence, but that it was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 80 L.Ed.2d 674 (1984).

[3] Under the circumstances of this case, it seems clear that Barkauskas has not shown any prejudice from his former counsel's failure to call witnesses, or any abuse of discretion or denial of due process in limiting the second hearing to Webb's testimony in response to a motion by present counsel which referred only to the need for Webb's testimony.

Petitioner's brief on appeal lists several persons or classes of persons who may have knowledge and memory of the significant events in this proceeding:

> the Assistant State's Attorney originally assigned to investigate the case; the police officers present at the scene of the original incident, as well as the line-up, (not just the police officers called by the state at the evidentiary hearing); defense counsels for the Beringer

brothers, who witnessed Assistant State's Attorney Wadas' statement that he met with Harvey Webb prior to the Barkauskas trial; and Mr. Kenneth Malotesta, who was allegedly present when Mr. Wadas interviewed Mr. Webb.

Former counsel for Mr. Barkauskas did not call any of those people, and would ordinarily be deemed to have waived the right. Assuming it would be unfair to rely on that waiver, present counsel in seeking reopening did not represent that any of those people would testify favorably to petitioner, and on appeal argues only that there was not "a full hearing on the issue." The record contains no reason to believe that the limitation of the second hearing to Webb's testimony prevented an outcome more favorable to Barkauskas.

[4] Looking solely by analogy at authority considering the requirement of a showing of prejudice in a claim of ineffective assistance of counsel, the party must present evidence, not mere conclusory allegations, that counsel overlooked exculpatory testimony. *United States v. Asubonteng*, 895 F.2d 424, 429 (7th Cir.1990); *United States v. Giangrosso*, 779 F.2d 376, 381 (7th Cir.1985); see also *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1016 (7th Cir.1987) (when "allegation of ineffectiveness of counsel centers on a supposed failure to investigate, we cannot see how...the petitioner's obligation can be met without a comprehensive showing as to what the investigation would have produced").

The judgement appealed from is AFFIRMED.

APPENDIX G:

REPORT OF PROCEEDINGS

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Criminal
Plaintiff,	)	No. 81-5637
vs.	)	Charge: Post Conviction
EDWARD BARKAUSKAS,	)	
Defendant.	)	

REPORT OF PROCEEDINGS had of the hearing in the above entitled cause, before the Honorable RALPH REYNA, Judge of said court, on the 13th day of May, 1992.

APPEARANCES:

HONORABLE JACK O'MALLEY,
State's Attorney of Cook County, by:
MR. JOHN HASKINS,
Assistant State's Attorney,
for the People of the State of Illinois;

MR. JAMES PINK,
for the defendant.

J.D. Williams, CSR
Official Court Reporter
2650 S. California Ave.-4C02
Chicago, Illinois 60608

THE CLERK: Sheet 1; Edward Barkauskas.

MR. PINK: Good morning, Judge Reyna, for the record James Pink, P-i-n-k, on behalf of the petitioner.

This is a post conviction matter, your Honor, I believe Mr. Haskins is representing the state's attorney, he hasn't arrived yet. Do you want to pass it?

THE COURT: Sure.

MR. PINK: Thank you.

(Whereupon, the case was padded.)

THE CLERK: Sheet 1; Edward Barkauskas.

MR. HASKINS: Good morning, your Honor, for the record John Haskins for the State.

MR. PINK: For the record, your Honor, James Pink, P-i-n-k, o n behalf of the petitioner.

THE COURT: What do you want to do?

MR. PINK: The post conviction is here for State's motion to dismiss.

MR. HASKINS: We can argue it if you want.

THE COURT: Proceed.

MR. HASKINS: Basically, your Honor, all the issues the petitioner brought up on this case have already been heard in the appellate court so we filed our motion to dismiss based on *res judicata* waiver. We don't feel that there are any issues that were not already determined in this case.

It was affirmed on appeal, supreme court denied it and through a federal habeas corpus the ruling will remain the same. And under the Illinois law once the case has gone through the appellate process, *res adjudicata* and waiver that is what we indicated on our motion and rest on our motion.

MR. PINK: In response, your Honor, I don't believe we need to address the State's motion to dismiss as far as No. 1 and No. 2 go. Whether or not there is a constitutional question raised it's quite obvious post-conviction petition alleges, your Honor, that it was a *Brady* violation in that the State's Attorney's Office withheld favorable evidence from the defense prior to their trial. Clearly this would fall under the post-conviction hearing act.

Secondly, --

THE COURT: But was that one of the issues that the appellate court heard?

MR. HASKINS: Yes, your Honor, it was.

MR. PINK: Your Honor, what happened was this isn't a simple matter where the appeals addressed the issues. What happened was during the following the appeal it came out during an A.R.D.C. hearing that the state's attorney, Mr.

Kenneth Wadas, testified under oath contrary to what he said in open court at, in 1983 on a post-trial motion.

Following the appeals, your Honor, there was a writ of habeas corpus filed, it went up to the 7th Circuit Court of Appeals who remanded the case for an evidentiary hearing and stated that in their opinion they didn't think the issue was fully litigated, fully heard in an evidentiary hearing and as such they wanted one heard at the district court level.

At district court level the attorney for the defendant petitioner failed to put on any evidence at that time. He indicated to Magistrate Elaine Bucklo that he intended to call several witnesses if not up to twenty witnesses. At the date of the hearing he stood in front of Judge Bucklo, Magistrate Bucklo and said I don't have any witnesses to put on at this time. Following that he was discharged from the case, the matter was then brought back up and the evidentiary hearing was not allowed to be reopened fully.

Your Honor, I believe this is the type of issue that post-conviction hearing act was meant to cover, to fully determine whether or not what we allege in our petition is true or not.

THE COURT: Well, why wasn't it allowed to be opened?

MR. PINK: Your Honor, when it was brought back up to the 7th Circuit we alleged that there was ineffective assistance of counsel in that he had witnesses to call, it's obvious he needed to call them and it was his burden of proof. The case law says it was his burden of proof. He did not call any

witnesses and he stood there and argued that well, it's the State's burden of proof. Unfortunately the 7th circuit Court of Appeals said that we cannot hear this because the habeas corpus petition is a civil remedy and as such the right to effective assistance of counsel does not apply. And as much as you know it smacked of incompetency, their hands were tied.

So here we are before y our Honor asking for the full hearing that the 7th Circuit first said we were entitled to but due to incompetency by counsel we never obtained.

THE COURT: Was that another issue brought before the appellate court, incompetency of counsel?

MR. PINK: No, your Honor, it is just the incompetency at the federal level when he should have put on a hearing.

THE COURT: Any response to that?

MR. HASKINS: Judge, just basically the case law in this particular case is pretty cut and dry. When these cases are taken through the appellate process under the doctrine of *res judicata* and waiver anything that the Court terms determines is *res judicata* and anything that they determine and didn't is waived and that is the law in the State of Illinois.

THE COURT: Anything else?

MR. PINK: Your Honor, other than the fact that this was a matter where evidence came out five years after the fact it's not a simple case where the issue has been litigated and appealed and appealed and appealed and we're getting one more bite of the apple. This is ne where the issue was never really

litigated and as such I believe at least we should get by motion to dismiss, your Honor, because it doesn't appear to be frivolous. The State should be required to file an answer.

THE COURT: Well, from the evidence, the testimony, argument it seems to me that the issues were litigated. Motion to dismiss will be sustained.

MR. HASKINS: Thank you, Judge.

(Which was all the evidence offered and receive and all other proceedings had in the trial of the above cause.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, Jewel Williams, an Official Court Reporter for the Circuit Court of Cook county, County Department-Criminal Division, do hereby certify that I reported in shorthand the proceedings had in the above entitled cause, that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable RALPH REYNA, Judge of said court.

_____
Official Court Reporter

Dated this 17th day
of June, 1992.

APPENDIX H:

ORDER OF APPELLATE COURT
OF ILLINOIS FIRST JUDICIAL DISTRICT, SIXTH
DIVISION, JUNE 17, 1994

No. 1-92-2153

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Respondent-Appellee,	)	P.C. 81 C 5637
v.	)	Honorable Ralph Reyna Judge Presiding.
EDWARD BARKAUSKAS,	)	
Petitioner-Appellant.	)	

ORDER

Defendant, Edward Barkauskas, appeals from the dismissal of his post-conviction petition. He contends it should not have been dismissed without an evidentiary hearing.

Defendant was arrested on July 16, 1981 in connection with the fatal shooting of his wife. Three other men, Joseph Beringer, Kenneth Beringer and James Galason, who were allegedly hired by defendant to commit the murder, were also charged. The State tried defendant separately, relying principally upon the testimony of James Galason who testified that defendant solicited Galason and the Beringer brothers to kill defendant's wife in exchange for the proceeds of a life insurance

policy. Galason testified that it was Joseph Beringer who actually shot the victim.

Defendant was convicted on February 2, 1983. On March 23, 1983, Harvey Webb, an eyewitness to the shooting, testified at the trial of Joseph and Kenneth Beringer that Galason, not Joseph Beringer, fired the shots that killed defendant's wife. Webb also testified that he had identified Galason as the shooter to one of defendant's prosecutors, Kenneth Wadas, after defendant's trial, "about February 21st.

Relying on Webb's testimony at the Beringer trial, defendant moved for a new trial, claiming that the State had withheld favorable evidence that Webb claimed that Galason and not Beringer shot defendant's wife. The trial court reviewed the Beringer transcript and determined that no discovery violation occurred even taking Webb's testimony as true, since Webb stated that the first time he told the State that Galason was the gunman was after the conclusion of defendant's trial.

Defendant appealed to this court claiming that he should receive a new trial because the State failed to reveal that prior to defendant's trial Webb told Wadas that Galason was the gunman. Defendant argued that the trial court was not fully apprised at the hearing on the motion for a new trial in that the court did not have the benefit of transcripts of comments made by Wadas during the Beringer trial which showed that Wadas and Webb met prior to the conclusion of defendant's trial. Wadas' testimony was essentially that he was not sure, but thought he had met with Webb in January. He also stated that as far as he knew Webb had only identified Joseph Beringer as the shooter. This court stated:

> "After reviewing the proceedings in the Beringer case, we find no reason to disturb the trial court's determination that Webb identified Galason as the shooter for the first time on February 21, 1983. There is no indication from the transcripts now before us that the prosecution possessed any information with respect to Webb's identification of Galason prior to or during defendant's trial. The transcripts simply reveal that the prosecution was uncertain as to the date of its meeting with Webb. The trial court, in light of Webb's two positive assertions at the Beringer trial, resolved the issue by determining that the meeting took place on February 21, and therefore properly denied defendant's motion for a new trial."

(People v. Barkauskas (1986), 147 Ill.App.3d 360, 366, 497 N.E.2d 1183.) This court also held that even if the prosecution had possessed the alleged evidence prior to defendant's conviction, the evidence was not material because it did not cast a reasonable doubt on defendant's guilt. *Barkauskas* 147 Ill.App.3d at 366.

The Illinois Supreme Court denied a petition for leave to appeal.

Defendant then filed a petition for *habeas corpus* in Federal district court. The petition alleged a discovery violation based on the State's claimed failure to disclose that Webb told Wadas that Galason was the gunman. The Federal court denied relief finding that nothing in the record refuted the findings of the State courts.

Defendant appealed to the Seventh Circuit court of appeals which did not accept the discovery violation argument, but remanded for a hearing on a different (and ultimately discredited) question. After this hearing, which occurred on January 11, 1990, the court of appeals affirmed the denial of defendant's petition for a writ of *habeas corpus Barkauskas v. Lane*, 946 F.2d 1292 (7th Cir. 1991).

On March 3, 1988, Wadas testified before the Attorney Registration and Disciplinary Commission that regarding Webb:

> "I searched for the guy with a crew of investigators for a year and a half and couldn't find the guy. He was like a surprise to me that he would even be in shape to testify. So that was the day -- the day before (the Beringer trial) is when I knew that Webb would testify."

On December 31, 1991, defendant filed his petition for post-conviction rel. of in the circuit court of Cook County which claimed, therein, that the State violated its discovery obligations by failing to inform the defense in a meeting prior to defendant's trial, Webb told Wadas that Galason was the gunman. The petition claimed that if the trial court had been aware of Wadas' statements during the Beringer trial, the court would have granted his motion for a new trial. The State filed a motion to dismiss contending, *inter alia*, that defendant's claim was barred by *res judicata* and waiver. The court granted the State's motion.

An action for post-conviction relief represents a collateral attack on a prior judgment, and it is not an appeal from the

underlying conviction and sentence. *(People v. Emerson* (1992), 153 Ill.2d 100, 106, 606 N.E.2d 1123.) To be entitled to post-conviction relief a defendant must establish a substantial deprivation of constitutional rights in the proceeding that produced the judgment under attack. (*Emerson*, 1553 Ill.2d at 106.) There is no entitlement to an evidentiary hearing on a post-conviction petition unless the allegations of defendant make a substantial showing that the defendant's rights have been violated. *People v. Spreitzer* (1991), 143 Ill.2d 210, 218, 572 N.E.2d 931.

It has been well established that when a defendant has taken a direct appeal from a judgment of conviction on a complete record, the judgment of the reviewing court is *res judicata* as to all issues which were actually decided by the court, all issues which could have been presented to the court, but were not, are waived. *(People v. Tonaldi* (1984), 129 Ill.App.3d 183, 187, 472 N.E.2d 123.) This is so even thought the post-conviction petition attempts to change the character of the questions previously advanced and decided. (*Emerson*, 153 Ill.2d at 106.) One exception to the rule that issues which could have been raised on direct appeal are barred by *res judicata* is the situation where allegations are based on facts which do not appear in the record. *Tonaldi*, 129 Ill.App.3d at 188.

Defendant argues his claim should not be barred by *res judicata* because "the proof as to the date of the 'Webb meeting' *** was never fully proven until after the A.R.D.C. hearing on March 3, 1988, and the evidentiary hearing before Magistrate Elaine Bucklo on January 11, 1990." However, we have reviewed all of the proceedings and believe this testimony again only established that Wadas was unclear of when he met with

Webb. These "new factual allegations" add nothing to defendant's cause.

Also defendant for the first time now raises the issue that he was denied his right to due process by the State's knowingly using perjured testimony. This issue could have been raised previously and is waived. *Tonaldi*, 129 Ill.App.3d at 187.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

RAKOWSKI, J., with EGAN, P.J., and McNAMARA, J., concurring.

APPENDIX I:

ILLINOIS SUPREME COURT DENIAL OF PETITION
FOR LEAVE TO APPEAL

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

October 6, 1994

Mr. Edward Barron
Law Offices of Edward Barron
5170 W. 95th St.
Oak Lawn, IL 60453

No. 77576 - People State of Illinois, respondent, v. Edward Barkauskas, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.